No. [redacted]-1552

[redacted]

v.

United States of America, Respondent

[redacted]

PETITION FOR A WRIT OF CERTIORARI TO THE [redacted] COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

JOHN H. WEIDMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John H. Weidman, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned case on March 31, 1978.

OPINION BELOW

The opinion of the District Court for the Northern District of Indiana is set forth in Appendix A. The opinion of the Court of Appeals, not yet reported, is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1978. On April 14, 1978, the Court of Appeals entered an order staying the mandate to and including May 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a prosecutor's constitutional duty to disclose evidence favorable to the defendant, and specifically requested by him, extends to information in the possession of another, non-prosecutorial agency of the government.

2. Whether the Jencks Act requires a prosecutor to disclose a witness's statement, specifically requested by the defendant, which is in the possession of another, nonprosecutorial agency of the government.

3. Whether evidence of prior similar acts is admissible against a defendant corporate officer where those acts were committed by other corporate personnel without either the participation or prior knowledge of the defendant.

STATUTORY AND RULE PROVISIONS INVOLVED

The Jencks Act, 18 U.S.C. § 3500, provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
>
> * * *

> (e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Rule 404(b) of the Federal Rules of Evidence provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

STATEMENT

The petitioner, John H. Weidman, Jr., and twenty-one other individuals were charged in the Northern District of Indiana in a multi-count indictment alleging mail fraud, conspiracy, and perjury. The indictment claimed that petitioner, the president of Walsh Construction Company, had conspired with other Walsh corporate personnel and with suppliers of goods and services to defraud the company and one of its clients, the Bethlehem Steel Corporation.

As to twenty of the defendants, the indictment was dismissed following a variety of plea bargains. Only

petitioner and Thomas J. McGrath, a Walsh vice-president, went to trial. McGrath was acquitted. Petitioner was convicted of fourteen counts of mail fraud and one conspiracy count. He was sentenced to two years, six months to be served and the balance on probation, and received fines totalling $10,000.

The alleged fraud consisted of milking a huge construction project that Walsh was conducting for Bethlehem at Burns Harbor, Indiana. Money, goods, and services were allegedly provided for the private benefit of the defendants and the unindicted co-conspirators. The cost of these stolen benefits was defrayed in the first instance by Walsh; and to the extent Walsh then included that cost in its invoices to Bethlehem, it was paid by Bethlehem.

Although voluminous evidence was introduced at trial as to the participation of others in the alleged scheme, the evidence as to petitioner's involvement was very slight. Among the main witnesses testifying against the petitioner was Walter B. Cox, the master mechanic at the Burns Harbor project who played a major role in the scheme. Cox was fired by petitioner after Cox's misconduct was revealed, and he arranged a plea bargain with the government in exchange for implicating petitioner. At the trial, Cox attributed to petitioner both specific and general involvement in the fraudulent scheme.

Information bearing on the credibility of Cox was obviously of supreme importance to the defense. Petitioner therefore made a pretrial request for, *inter alia*, all "prior inconsistent statements" of witnesses, and upon learning during the trial that Cox had complained of his discharge to the National Labor Relations Board, petitioner requested the "entire NLRB

file on the Walter B. Cox grievance," as well as the "entire Federal Bureau of Investigation file" dealing with Cox's conduct in the NLRB matter when he evidently attempted to bribe an NLRB official to support his grievance against Walsh. The trial request, made by formal motion, expressly sought the production of these materials under both *Brady* v. *Maryland*, 373 U.S. 83 (1963) and the Jencks Act, 18 U.S.C. § 3500.[1] After the prosecutor stated that he did not "have it" (T. 2496),[2] the trial court denied the motion.

At another point during the trial, over petitioner's objection, the prosecutor was permitted to introduce evidence of "prior similar acts." This evidence related to allegedly fraudulent activities by Walsh supervisory personnel in four earlier construction projects—one for Bethlehem and three for National Steel. As to the first project, undertaken for Bethlehem Steel at Sparrows Point, Maryland, the government acknowledged that petitioner had *no* connection with it, but nevertheless adduced testimony that Walsh had distributed benefits to supervisory personnel in connection with the project.[3]

As to two of the National Steel projects—Midwest and Great Lakes—the government introduced testimony by witness Beutler, a National Steel auditor,

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[1] Motion to Compel Production of Additional 3500 and/or *Brady* material, November 10, 1975.

[2] The trial transcript is cited herein as "T.——"; transcripts of other proceedings in the case are cited as "T. [date], p. ——."

[3] The purported justification of the evidence was that it proved the guilty knowledge and intent of a government *witness*, Dunn. This was patently a mere ruse, for the witness in question admitted his own guilt.

that National had been subjected to overcharges in "157 different ways" (T. 2143-46) and that after Beutler had complained, petitioner had defended the legitimacy of the charges to National. According to Beutler, petitioner argued that such charges had always been made and paid in the past, so that "we are just continuing to do business as usual." (T. 2161-62). There was nothing to show, however, that petitioner had been involved in any of the allegedly improper practices which led to the claimed overcharges, or had even previously known about them, but only that he had made an after-the-fact defense of the propriety of the charges based on precedent.

As to the final National Steel project, at Weirton, West Virginia, not only was it conceded that petitioner was in no way connected, but Beutler hadn't even included it in his audit of claimed overcharges. Nevertheless, the government was allowed to introduce evidence that National had been subjected to overcharges.

After the verdict and the filing of an appeal, it was discovered that the government had withheld certain *Jencks-Brady* material relating to witness Cox's NLRB complaint and the bribery charge, even though documents containing such information had been specifically requested by petitioner. On April 7, 1976, the prosecutor produced three documents: an NLRB letter to United States Attorney Lee requesting an investigation of the bribery charge against Cox, an FBI report of its investigation, and the United States Attorney's declination of prosecution.

Upon joint motion by petitioner and the government, the Court of Appeals remanded the case for consideration of petitioner's new trial motion.

In an evidentiary hearing on August 31, 1976, still a fourth document (App. C) was produced by NLRB Field Examiner Stanley J. Fender, who had interviewed Cox on September 14, 1972, after Cox had been discharged and had filed an unfair labor practice complaint against Walsh. This document was Fender's handwritten affidavit-form recital of the account Cox had given him of the Burns Harbor improprieties. Although Cox had refused to read or sign it in the absence of his attorney, the document was, according to Fender, a contemporaneously written and substantially verbatim account of what Cox had told him. Significantly, the statement laid responsibility for the Burns Harbor improprieties upon other Walsh supervisory personnel, and in no way implicated petitioner Weidman.

On May 6, 1977, the District Court denied the new trial motion.

On March 31, 1978, the Court of Appeals affirmed petitioner's original conviction and the denial of the new trial motion.

As to the withheld documents regarding the NLRB matter and Cox's statement to NLRB Examiner Fender, the Court of Appeals acknowledged that petitioner's "argument raises some major questions concerning the scope of the prosecutor's constitutional obligation to produce evidence favorable to the defendant." (App. B, *infra,* p. 27a). Nevertheless, the Court concluded that no constitutional violation had occurred because the NLRB file "was not in the hands of the prosecution, nor, apparently, was the prosecution even aware of the alleged bribery attempt before [petitioner] Weidman requested the file three weeks after the trial had begun." (App. B, *infra,* p. 28a). Since pe-

titioner was aware of the alleged bribery attempt, the Court stated, he could have "subpoena[ed] the file from the NLRB (a non-prosecutorial agency of the government) and subpoena[ed] [NLRB Examiner] Fender himself." (App. B, *infra,* p. 28a). The prosecutor's failure to produce the documents therefore did not amount to "a 'suppression' of evidence within the meaning of *Brady.*" (App. B, *infra,* p. 29a).

The Court also rejected petitioner's claim that the Jencks Act, 18 U.S.C. § 3500, required production of the "statement" that Cox gave to the NLRB official. The Court stated that it was not clear that the Act required the production of "statements" in the possession of "other, non-prosecutorial agencies of the government." (App. B, *infra,* p. 30a). The Court also doubted whether there was a "necessary inconsistency" between Cox's statement to Fender and his subsequent trial testimony implicating petitioner and stated that Cox had "been thoroughly impeached on other grounds." (App. B, *infra,* pp. 30a-31a).

With regard to the evidence of "prior similar acts," the Court held that this was admissible "on the issue of intent," and as "evidence of a pre-existing design or scheme." (App. B, *infra,* pp. 19a-20a). Although there was no convincing proof that petitioner participated in these other fraudulent activities, the Court stated that the "evidence did indicate that Weidman was well aware of the earlier schemes in all of their particulars" and that "Rule 404(b) [of the Federal Rules of Evidence] does not require the defendant to be an active participant in the other similar acts." (App. B, *infra,* pp. 20a, n.4). Evidence of petitioner's "knowledge of earlier schemes [therefore] served as the basis for their relevancy on the issue of intent." (App. B, *infra,* pp. 20a-21a).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is In Conflict With This Court's Decision In *United States* v. *Agurs*, And The Decision Of The Fifth Circuit In *United States* v. *Deutsch*, On The Issue Of Whether A Prosecutor Is Required To Disclose Information, Favorable To The Defendant And Specifically Requested By Him, Which Is In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The Court of Appeals held that, despite petitioner's specific request for the NLRB file regarding Walter Cox's unfair labor practice complaint and alleged bribe attempt, the government's failure to produce these documents was not wrongful because the file "was not in the hands of the prosecution" (App. B, *infra,* p. 28a) but rather in the possession of the NLRB.

In *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963), this Court held that the Constitutional right to due process is violated by a prosecutor's rejection of a defendant's request for production of evidence favorable to the defendant on the issue of either guilt or punishment. In *Giglio* v. *United States,* 405 U.S. 150, 154 (1971), it was made clear that "nondisclosure of evidence affecting credibility [of a witness whose 'reliability may well be determinative of guilt or innocence'] falls within [the *Brady*] rule."

Finally, in *United States* v. *Agurs,* 427 U.S. 97, 106 (1976), the Court declared that where the defendant makes a specific request for evidence favorable to him, ". . . the failure [of the prosecutor] to make any response is seldom, if ever, excusable."

Brady and *Agurs* clearly envision that where, as here, a specific request is made for documents favorable to the defense, the prosecutor is obligated to make

a reasonable effort to produce such documents. Contrary to the decision below, the prosecutor should not be permitted to ignore the request or to keep himself in purposeful ignorance of the existence of the documents requested.

Directly on point is *United States* v. *Deutsch,* 475 F.2d 55 (5th Cir. 1973), where the defendants, charged with offering to pay a postal employee for credit cards abstracted from the mails, and with paying him with intent to induce him to violate his lawful duty, moved for production of the postal employee's personnel file in order to examine it for possibly impeaching material. The trial court denied the motion on the ground that the U.S. Attorney's office did not have the file. On appeal, the Fifth Circuit held that the denial was error. Rejecting the government's argument that because the Post Office Department was not an "arm of the prosecution, there was no duty under *Brady* to produce the files," the Court stated:

> "We find no reference in *Brady* to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files . . . . [T]here is no suggestion in *Brady* that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities." *Id.* at 57.

In the instant case, Cox was one of the government's principal witnesses against petitioner. Indeed, it was Cox who, according to the prosecutor, turned out to

be the star witness "without whom [the prosecution] couldn't have tried the case. All that would have happened is for him to say that 'I'm not going to testify' and we couldn't have gone to trial . . . ." (T. 3/3/76, pp. 12-13). The trial court similarly called him "the figure about which it all revolved." (T. 1/21/76, p. 105).

In view of the central importance of Cox's testimony to the case, petitioner made a specific request for information bearing on Cox's credibility and explicitly demanded the NLRB files previously mentioned. These files dealt with Cox's claim that he had been fired as a sacrificial goat in the very conspiracy charged against petitioner Weidman and with Cox's attempt to bribe the NLRB official to support his claim. Despite Cox's role as the prosecutor's star witness and the fact that the requested documents pertained to the same activities which formed the basis for the indictment of petitioner, the trial court denied petitioner's motion to compel their production after the prosecutor represented that he "didn't have" the documents.[4]

In the opinion below, the Court of Appeals stated that, in the face of these refusals by the prosecutor and the trial court, petitioner should then have sought to subpoena the documents from the NLRB and also to have subpoenaed the NLRB examiner, Fender. This is directly contrary to the position of the Fifth Circuit in *United States* v. *Deutsch, supra,* in which the government made the same argument. The Fifth Circuit

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[4] The three documents relating to Cox's bribery attempt, which the government later produced in the evidentiary hearing on petitioner's new trial motion, all have stamps showing they had been in the United States Attorney's possession *since 1972.* (T. 8/31/76, pp. 28-38).

flatly stated that the obligation rested with the government, not the defendant, to secure the materials:

> "Nor are we impressed by the government's argument that having been denied Rule 16 production, defendant was at fault for not seeking a subpoena duces tecum . . . ." 475 F.2d at 57, n. 2.

It is the necessary implication of *Brady* and *Agurs*, as well as the explicit holding of the Fifth Circuit in *Deutsch*, that the prosecutor is obligated to make a reasonable effort to produce information in the possession of another government agency where, as here, that information is clearly favorable to the defendant and has been specifically requested by him. A prosecutor's asserted unawareness of a document in another part of the United States Attorney's Office, or of information in the possession of another prosecutor in the office, does not excuse a failure to produce the information upon a specific request by the defendant. *Giglio* v. *United States*, 405 U.S. 150. *Cf. Santobello* v. *New York*, 404 U.S. 257, 262 (1971).

Here, three of the four documents in question appear to have been in the U.S. Attorney's files (see n. 4, *supra*) and the merest reference to them by the prosecutor would have led to the fourth, in the possession of the NLRB. Moreover, even if an excuse could be found for the prosecutor's claim that he "didn't have" the documents, the petitioner made him aware of the *Brady* materials in the possession of the NLRB through a specific request. At that point, it became the duty of the prosecutor, as the government's representative, to make a reasonable effort to obtain documents that were obviously material to the guilt or innocence of the defendant. The requested NLRB documents related to

the credibility of the prosecutor's star witness and to the NLRB's investigation of the same activities that formed the basis for the petitioner's indictment. In these circumstances, as in *Giglio* and *Deutsch*, the prosecutor's failure to respond, and the trial court's concurrence, cannot be excused.

Having incorrectly decided that there was no "suppression" of information within the meaning of *Brady*, the Court of Appeals had no occasion to address the question whether the withheld NLRB documents were sufficiently "material" under the standard of *United States* v. *Agurs, supra*, to have required production.[5]

As the Court stated in *Agurs*, the prosecutor is required to respond "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists . . . . When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

Plainly enough, the "subject matter" of petitioner's request was relevant and material, since it went to the credibility of witness Cox and the NLRB investigation of Cox's charges regarding the Burns Harbor activities on which the indictment of petitioner was based. The documents eventually disclosed after trial, in particular Fender's notes of Cox's "statement," were shown in fact to be extremely material to the central issues in the case. Indeed, Cox's statement was not merely cumulative of other impeachments of his character. It stood alone as tending to prove that his testi-

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[5] The Court of Appeals evaluated the "materiality" of Cox's statement only under the general standard of the Jencks Act, and not the special standard of *Agurs*.

mony against petitioner *was false*. It laid the responsibility for the Burns Harbor criminality to other Walsh supervisory personnel—*and in no way to petitioner Weidman*. Cox mentioned petitioner only as the agent through whom Walsh fired him. Cox's statement thus implicitly exonerated petitioner of the charges against him and also directly contradicted Cox's sworn testimony at trial. Certainly this constitutes "material" evidence to which petitioner was entitled under *Agurs*. As this Court stated in *Agurs*, a prosecutor's failure to respond to a specific request is "seldom, if ever, excusable."

In *Deutsch*, the Fifth Circuit similarly held that the defendants would be entitled to a new trial if the prosecutor's failure to respond caused them to be "deprived of something of value" and that such would have occurred if the withheld documents "would have afforded useful cross-examination." 475 F.2d at 58.

In the case at bar, Cox's "statement" would certainly have afforded "useful cross-examination," since it exonerated petitioner and was inconsistent with Cox's trial testimony. Again, it fully met the standard of *Agurs*. To excuse non-production upon the ground that the material did not "necessarily" dispute Cox's testimony is to flout the authority of *Agurs*.

Petitioner submits that the Court should grant the petition to resolve the clear conflict in the circuits and to answer what the Court of Appeals conceded are "major questions concerning the scope of the prosecutor's constitutional obligation to produce evidence favorable to the defendant." (App. B, *infra*, p. 27a).

II

The Decision Below Conflicts With The Decision Of The Ninth Circuit In *Harvey Aluminum v. NLRB* And The District Of Columbia Circuit In *United States* v. *Bryant* On The Issue Of Whether The Jencks Act Requires A Prosecutor To Produce Witnesses' Statements In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The Court of Appeals also held that the prosecutor's failure to produce the "statement" which Cox gave to the NLRB official did not violate the Jencks Act, 18 U.S.C. § 3500, which requires production of witnesses' statements "in the possession of the United States." The Court stated that it found persuasive the view of the Third Circuit in *United States* v. *Dansker*, 537 F.2d 40, 61 (1976), *cert. denied*, 429 U.S. 1038 (1977), that "the statute . . . require[s] production only of statements possessed by the prosecutorial arm of the federal government." Since Cox's statement was in the possession of the NLRB, the Court below apparently thought that it need not have been produced. Finally, the Court stated that, even if the Jencks Act did require production, Cox's "statement" was not sufficiently material to require a new trial.

Petitioner submits that the Jencks Act, by its very language—"in the possession of the United States"—covers more than those papers possessed by the particular prosecutor's office. This was the conclusion of the Ninth Circuit in *Harvey Aluminum* v. *NLRB*, 335 F.2d 749, 754 (1964) which involved the other side of the coin—whether Department of Justice documents are producible under the Jencks Act in an NLRB proceeding. Holding the Jencks Act applicable and the documents producible, the Court stated:

> "The rationale of the rule . . . applies with equal vigor whether the statements are in the pos-

session of the agency conducting the hearing or of another agency of the government . . . . *The* [National Labor Relations] *Board, the Department of Justice, and the Department of Labor are all parts of the government of the United States.*"

* * *

"*In a criminal prosecution the Department of Justice would scarcely be heard to say that it was not required to produce statements otherwise within the rule simply because the documents rested in the hands of another federal agency,* and we perceive no valid distinction, for this purpose, between that case and this one." (Emphasis added).

A similar conclusion was reached by the District of Columbia Circuit in *United States* v. *Bryant,* 439 F.2d 642, 650 (1971), where, in a criminal prosecution, the Court held that the Jencks Act required the production of materials in the possession of the Bureau of Narcotics and Dangerous Drugs. The Court noted that "[t]he duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies. Rule 16 and the Jencks Act refer, respectively, to evidence, gathered by 'the government' and 'the United States,' not simply that held by the prosecution." *Id.* at 650. *See also Augenblick* v. *United States,* 337 F.2d 586, 597-98, 180 Ct. Cl. 131 (1967), *rev'd on other grounds,* 393 U.S. 348 (1969); *United States* v. *Ehrlichman,* 389 F.Supp. 95, 96 (D. D.C. 1974).

Cox's statement to the NLRB was taken by NLRB employee Fender as part of that agency's investigation of Cox's charges concerning the activities of Walsh Construction Company and its personnel at the Burns Harbor project. The subject of the NLRB investiga-

tion, of which Cox's statement was a part, related to the same actiivties that are the subject of the instant indictment and prosecution. At least in these circumstances, the Jencks Act clearly contemplates that the statement of a witness as important as Cox be produced.

The Third Circuit's decision in *United States* v. *Dansker,* on which the Court of Appeals relied, does not support the result in this case, since the issue there was whether the Act required production of a pre-sentence report prepared for use by the court by "[t]he probation department [which] . . . acts as an arm of the court in such preparation." 537 F.2d at 61. The distinction made in *Dansker* was between judicial records and executive records, not between records of different agencies of the executive branch. A decision that a judicial document[6] need not be produced under the Jencks Act thus offers no support for the proposition that the prosecutor, when faced with a Jencks Act request, can put on blinders with regard to relevant documents in the records of other executive agencies.

The decision below is hence in conflict with decisions of the Ninth and District of Columbia Circuits on the question whether the Jencks Act requires the production of statements in the possession of non-prosecution agencies. This Court should grant the petition to resolve this conflict.[7]

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[6] For such documents, it may well be the better practice to address production requests to the court, rather than to the prosecutor.

[7] Moreover, for the reasons already stated, Cox's statement was extremely material and not merely cumulative of other impeachments of Cox's character.

III

The Decision Below Raises Substantial And Important Questions Concerning The Admissibility Of "Prior Similar Acts" Under Rule 404(b) Of The Federal Rules of Evidence

The Court of Appeals held that evidence of allegedly fraudulent activities by Walsh supervisory personnel in four earlier construction projects was properly admitted against petitioner, despite the absence of convincing proof that petitioner participated in, or was responsible for, any of these allegedly fraudulent practices. The Court reasoned that petitioner was aware of the earlier schemes and that such knowledge "establishes the relevancy of the similar act evidence" (App. B, *infra,* pp. 20a-21a) with regard to the issues of intent and the existence of a design or scheme. The Court thus concluded that Rule 404(b) of the Federal Rules of Evidence "does not require the defendant to be an active participant in the other similar acts." (App. B, *infra,* p. 21a, n.4).

Petitioner submits that the decision below, in permitting the use of "similar offense evidence" concerning activities which petitioner did not engage in, was not responsible for, and became aware of only after they occurred, is contrary to Rule 404(b) and the established law regarding the admissibility of such evidence. Admission of the "prior similar offense" evidence in the present case was patently improper and extremely prejudicial.

The universal rule has long been that evidence of other crimes, wrongs, or acts is not admissible to prove the bad character of a person, but only for the limited purposes such as proof of motive, opportunity, intent, preparation or plan. The probative value of such evi-

dence rests on the notion that the defendant, having committed the prior similar offenses, was probably disposed to have committed the acts charged or to have had done so with unlawful intent. Of necessity, this presupposes that the prior similar offenses be misconduct "that the accused has committed . . . ." *United States* v. *Fierson,* 419 F.2d 1020, 1022 (7th Cir. 1969). If it is not clearly shown that the defendant actually committed the prior offenses, then there is no logical basis for any inference that the defendant committed the offense with which he is charged. "The oft-recognized dangers of related-crime evidence reach unacceptable levels when the very fact of the accused's involvement in the alleged related offense is open to serious doubt." *Hills* v. *Henderson,* 529 F.2d 397, 400 (5th Cir.), *cert. denied sub nom. Hills* v. *Maggio,* 429 U.S. 850 (1976).

Thus, in *United States* v. *Jaqua,* 485 F.2d 193, 195 (5th Cir. 1973), the Fifth Circuit reversed a conviction on the ground that evidence of the defendant's prior "criminal activity" was improperly admitted because, *inter alia,* there was no "evidence in the record that [the defendant] committed these acts." And in *United States* v. *Vosper,* 493 F.2d 433, 437 (5th Cir. 1974), the court reversed defendant's robbery conviction because of the admission of evidence placing the defendant near the scene of a prior robbery committed by the same individual who allegedly was an accomplice in the robbery with which the defendant was charged. Since there was "little, save his presence [and the guilt of his associate], to show that he had any responsibility for or participation in" the prior robbery, the court held that it was error to admit the evidence and that it "created the hazard of prejudice

not only that [the defendant] was a law breaker, but that he ran with other law breakers." *Id.* at 437.

That is precisely the situation in the present case. As to two of the four projects involving allegedly fraudulent practices (Sparrows Point and Weirton), it was conceded that petitioner had no connection whatsoever. (T. 1482, 2176). The admissibility of evidence regarding possible offenses by others at these projects is completely indefensible. Even as to the remaining two projects (the Midwest Steel project and the Great Lakes project), the testimony of the National Steel auditor, Beutler, attributed no responsibility to petitioner for any of the improprieties which gave rise to the alleged overcharges to the customer. Nor was there any proof that petitioner, prior to Beutler's complaints, had been aware of these overcharges. Instead, Beutler's testimony simply portrayed petitioner as a hard-nosed negotiator seeking to settle for the smallest possible adjustment to a customer complaining of alleged wrongdoing by employees.

Whatever civil responsibility may attach to a high corporate executive from after-acquired knowledge of misconduct by corporate employees, it is impermissible to charge him with criminal responsibility for acts he learned of only after they were committed. The specific criminal intent which must be shown in a mail fraud prosecution (*United States* v. *Bush,* 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied,* 424 U.S. 977 (1976)), cannot be imputed to a defendant from wrongful acts of his business associates or employees. Criminal liability cannot be founded upon the doctrine of respondeat superior, *Pritchard* v. *United States,* 386 F.2d 760, 766 (8th Cir. 1967), *cert. denied sub nom., Borchelt* v. *United States,* 390 U.S. 1004, (1968); see also *United States* v. *Interstate Engineering Corp.,* 288 F. Supp. 402, 412 (D. N.H. 1967) (Jury instruction by Chief Judge Wyzanski in a mail fraud case). *Cf. United States* v. *Vosper, supra.*

That petitioner received complaints of allegedly fraudulent practices on two projects, long after such practices had occurred, is certainly not the proper basis for an inference that he actually engaged in fraudulent practices in connection with some other project. If the decision below stands, however, it will be permissible, in cases where the defendant is a corporate officer or businessman, routinely to introduce evidence of prior offenses or acts committed by other corporate employees or business associates—not because the defendant was in any way responsible for such conduct—but merely because he was subsequently told about such alleged misdeeds or received complaints about them. Plainly enough, Rule 404(b) should not be read to open the door so wide as to allow the introduction of prejudicial evidence which has no true probative value and which can only serve to tar a defendant unfairly with the conduct of others.

In addition, even if his participation in these prior acts had been clearly shown, the evidence would still have been inadmissible. Petitioner's defense at trial, as stated in his opening argument, was a broad denial that he had committed the acts charged against him, not that he had committed them in good faith. Indeed, the nature of the charged acts was such that, if they were shown to have been committed, there could be no realistic denial of criminal intent. In such cases, where no defense of intent is asserted, evidence of similar act

evidence is inadmissible. *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975) (prosecution for mailing threatening letters); *United States* v. *DeCicco,* 435 F.2d 478 (2nd Cir. 1970) (prosecution for conspiracy to transport stolen goods in interstate commerce).

Thus, in *United States* v. *Benedetto,* —— F.2d —— (2nd Cir. 1978) (No. 77-1306, February 24, 1978), the defendant, charged with the receipt of money in connection with his official duties as a meat inspector, broadly denied taking the money and did not seek to put knowledge or intent in issue by claiming accident or mistake. At trial, the government was permitted to introduce "prior similar act" evidence that the defendant had previously accepted money from others. Although finding the evidence admissible on other grounds not applicable here, the Second Circuit noted that such evidence would not have been admissible to show knowledge or intent, since the defendant had not placed either in dispute.

If such evidence is inadmissible to show knowledge or intent even where the defendant actually committed the prior acts, *a fortiorari* such evidence is inadmissible where, as here, the defendant has not been shown to have committed the acts but only to have acquired *post hoc* knowledge of them.

The Court should grant the petition to resolve the substantial and important questions raised concerning the interpretation of Rule 404(b) of the Federal Rules of Evidence.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

The District Court's Order and Memorandum Opinion of May 6, 1977

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. S CR 74-115

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JOHN H. WEIDMAN, JR., *Defendant*.

(FILED MAY 6, 1977)

Order

Presently pending in this case is defendant's 22 April 1976 Motion for a New Trial. This case was originally appealed on 28 January 1976. On 15 June 1976, both parties filed a Joint Motion for Remand in the United States Court of Appeals for the Seventh Circuit to permit consideration of defendant's 22 April 1976 Motion for a New Trial and this court indicated it was in accord with this request. The United States Court of Appeals for the Seventh Circuit thereupon granted the Joint Motion and remanded the case for the limited purpose of considering defendant's Motion for a New Trial.

An evidentiary hearing on said Motion was held on 31 August 1976 and the court took the matter under advisement at that time pending the submission of post-hearing briefs. Following the submission of the post-hearing briefs, this court granted a 2 February 1977 Motion for further oral argument on the Motion for a New Trial and both sides presented oral arguments on 3 March 1977. After due consideration of all Motions and supporting memoranda, all issues raised in oral argument, the testimony

at the trial and post-conviction hearing, and all other matters of record,

IT IS THE ORDER OF THIS COURT that the defendant's 22 April 1976 Motion for a New Trial should be, and the same is hereby DENIED for the reasons set forth in the accompanying Memorandum.

/s/ ROBERT A. GRANT
District Judge

Enter: May 6, 1977

Memorandum

Defendant's 22 April 1976 Motion for a New Trial is grounded on three basic propositions: (1) alleged government promises to Walter B. Cox with respect to a fine; (2) an alleged 1972 offer of immunity to Walter B. Cox and related 1972 conversations between Cox and the government, and (3) nondisclosure of government reports on an attempted bribery of an NLRB official by Walter B. Cox.

I—ALLEGED GOVERNMENT PROMISES TO WALTER B. COX WITH RESPECT TO A FINE

Walter B. Cox was a government witness in a trial commencing on 28 October 1975 in which Defendant John H. Weidman, Jr., was ultimately found guilty on fourteen counts of mail fraud and one count of conspiracy. In that trial, a co-defendant, Thomas J. McGrath, was acquitted of all charges. Cox, a master mechanic on the Burns Harbor project, entered into a written Stipulation of Plea Agreement, dated 13 March 1974, and was sentenced on 21 January 1976 following the trial of Weidman. Cox entered his plea of guilty to the filing of a false income tax return and was given a split sentence of two years under 18 U.S.C. § 3651. Pursuant to the recommendation of the government, no fine was imposed. (Tr 1/21/76, pp. 105-106.)

At sentencing, Mr. Richard L. Kieser, the Assistant United States Attorney who prosecuted the case, (presently Acting United States Attorney for the Northern District of Indiana), made the following remarks which have been the focal point of vociferous dispute regarding the Motion for a New Trial:

> MR. KIESER: Thank you, your Honor. As to the second thing for the record: As to the defendant, Walter Cox —there is one agreement between Mr. Cox and his attorney and the Government which is not of record

> and that is that at the time of sentencing the Government would recommend that no fine be imposed on Mr. Cox and we do now make that recommendation.
>
> (Tr 1/21/76, pp. 61-62.)

The government is under a duty to disclose material favorable to the accused upon request. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). The Supreme Court has construed this duty to include a prohibition against the use of perjured testimony. *Giglio* v. *United States*, 405 U.S. 105 (1972). Most recently, the court delineated this responsibility in the case of *United States* v. *Agurs*, 96 S.Ct. 2392 (1976). In *Agurs*, the court discussed the general duty to disclose exculpatory information in light of a doctrine of materiality. The court categorized in *Agurs* three situations: (1) cases where the prosecution's case entails perjured testimony, (2) cases where a specific request for particular information is made, and (3) cases where a general request for "all *Brady* material" or "anything exculpatory" is made. *Id.* at 2397-2399.

The standard to apply in reviewing a failure to disclose evidence will vary according to the scenario. Where the government has obtained a conviction through the knowing use of false testimony, the conviction must be set aside "if there is any reasonable likelihood the false testimony could have affected the judgment of the jury". *Id.* at 2397. Where a specific request for particular evidence is tendered, "failure to make any response is seldom, if ever, excusable". *Id.* at 2399. Where a general request is made, nondisclosure will not violate the Constitution unless the omission is "sufficiently significant to result in the denial of the defendant's right to a fair trial". *Id.* at 2399. The standard of materiality for determining constitutional error regarding undisclosed evidence in this situation is whether the evidence "creates a reasonable doubt of guilt that did not otherwise exist". *Id.* at 2401.

In its initial Memorandum of 22 April 1976, the defendant, relying on Mr. Kieser's statements on 21 January 1976, alleged that the government had made a promise to Cox to recommend that Cox not be fined. At trial, Cox explicitly denied the existence of any such promise. (Tr 11/10/75, pp. 17-18.) At first blush there would appear to be a contradiction between Cox's in-court statement and Mr. Kieser's remarks at sentencing on 21 January 1976. If a promise regarding the fine was actually made, Cox rendered false testimony at trial and this case would fit the first situation outlined by the court in *Agurs*.

The details regarding the government's discussions and representations to Cox were the subject of extensive exploration at the evidentiary hearing held on 31 August 1976. At that hearing, Mr. Kieser was called by the defendant as a witness. He testified that there "was no agreement" (Tr 8/31/76, p. 42) between the government and Cox as to a fine and that his remarks to the court on 21 January 1976 were a "misstatement" (Tr 8/31/76, pp. 42, 56, 63). As recollected by Mr. Kieser, Cox approached him in December of 1974 (Tr 8/31/76, p. 51) and asked for "consideration" as to the possibility of a fine (Tr 8/31/76, pp. 52, 62). Mr. Kieser further testified that he thought he had responded to Cox by saying that the government would "consider it" (Cox's inquiry) (Tr 8/31/76, pp. 44, 62-63). He emphasized that he was not precisely sure as to what was the exact dialogue between him and Cox (Tr 8/31/76, pp. 42, 57, 62) but that "no commitment was made" (Tr 8/31/76, p. 63).

Walter B. Cox was also a witness at the proceeding. He testified that "There was no agreement" with regard to a fine (Tr 8/31/76, p. 223), but that he had a conversation with Kieser prior to the trial of Daniel Odell wherein Kieser stated that he would give him "consideration" (Tr 8/31/76, pp. 223, 225). According to Cox, the discussion arose in the context of Cox talking to Odell about a guilty

plea (Tr 8/31/76, p. 223). Cox testified that he did not know at sentencing on 21 January 1976 that Kieser would request that no fine be imposed (Tr 8/31/76, p. 236).

Ira Burman, Cox's attorney, testified at the hearing as follows:

> Q. All right. Were you ever apprised of an agreement or some understanding between the Government and Mr. Cox with respect to no fine or recommendations of no fine?
>
> A. My recollection is that on one of the occasions when I was before this Court seeking reduction of Mr. Cox's sentence, he stated that he had been promised that there would be no fine, and I asked Mr. Kieser—or Mr. Kieser—at this time before the Court—made some representation to the Court concerning the agreement, but I was never privy to any agreement concerning the fine, and all that I knew was what Mr. Kieser and Mr. Cox told me. And particularly what Mr. Kieser represented to this Court.
>
> Q. When was the first time you heard anything about the fine?
>
> A. The first time I heard about a fine was when the Court imposed it on Mr. Cox at the time of sentencing.
>
> Q. Were there any discussions held during that period that were not on record before the Court with respect to the fine by either Mr. Cox or Mr. Kieser?
>
> A. Not with me.
>
> Q. Not with you. So all you know about the fine is what is on the record before the Court?
>
> A. What's on the record. And what Mr. Cox has claimed he had told me, and when I heard about it, I talked to Mr. Kieser about it.

While Burman stated that he "was never privy to any agreement concerning the fine", he did say that Cox "stated that he had been promised that there would be no fine". When Cox himself was questioned about this, he responded as follows:

> Q. Well, did you—there's been testimony from your attorney that you told him that Mr. Kieser had promised you that there would be no fine?
>
> A. Well, I don't—if I misinterpreted that, that's different. But there was—at the time of my sentencing the statement was made. There was no promise before that—now he said that he would give consideration to me helping, if I could get Odell to plead guilty to save the expense of the trial and everything else. But he didn't plead, so I didn't have no deal.

Initially, the defendant argued in his brief of 22 April 1976 that there was a promise made to Cox about the fine and that the promise constituted exculpatory information. During oral argument on 3 March 1977 the defendant reasoned that evidence of any understanding or agreement would be sufficient to require a new trial and that "the Court does not have to find the existence of a promise per se of a contract" (Tr 3/3/77, p. 10). In support of this proposition, defendant relied on *United States* v. *Campbell*, 426 F.2d 547, 549 (CA 2 1970).

This court is faced with the task of determining what, if anything, transpired between Walter B. Cox and the government regarding a fine. Testimony at the hearing on 31 August 1976 was unquestionably uncertain, confusing and inconsistent at times. Nevertheless, this court is obligated, as the trial forum and the tribunal conducting the hearing, to make findings of fact and conclusions of law. Accordingly, this court finds that:

(1) The government did not, prior to sentencing, make any promise to Walter B. Cox that there would be no fine imposed or that the government would recommend to the court that no fine be imposed.

(2) There was at least one discussion between Walter B. Cox and Mr. Richard L. Kieser, then the Assistant United States Attorney working on the case, in which Cox requested consideration from the government as to the possible imposition of a fine by this court at sentencing.

(3) Mr. Kieser responded to Cox by telling him that he would be given consideration regarding the imposition of a fine.

(4) Cox did not have any agreement with the government outside his formal plea agreement.

Finding no agreement or promise outside the plea agreement, we do not believe the defendant's due process rights were violated under the rationale embraced by the court in *Giglio, supra.* The defendant insists, however, that this case involves "conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation". *Campbell, supra.* This standard of conduct embraced by the Second Circuit is, in the opinion of this tribunal, considerably broader than the standards enunciated by the Supreme Court in *Brady, Giglio,* and *Agurs.* It is a nebulous standard to interpret and affords a prosecutor minimal guidance as to what he is obliged to disclose. Absent the showing of a formal promise or agreement, we believe that the exculpatory "conduct" envisioned by the Second Circuit should be subjected to a standard of materiality as discussed in *Agurs.* What "might have led a witness" to anticipate leniency will inevitably vary as to circumstance and individual. Even if one accepts the

Campbell standard of "conduct", we do not believe that every discussion of possible leniency automatically becomes exculpatory as a matter of constitutional law. As the court observed in *Agurs:*

> The Court of appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady.* For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.
>
> Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.
>
> *Agurs, supra.*

The communications between Cox and Kieser as to the prospect of a fine constituted a preliminary discussion of possible additional leniency. Cox has stated that he did not have an agreement as to the fine and did not anticipate that Mr. Kieser would recommend no fine be imposed. As to the matter of the fine, we find no violation of the prosecutor's duty under the Constitution that would merit the granting of a new trial. Moreover, it was no secret to the jury that Cox had negotiated with the government as to leniency in general. He was tendered to the jury as a felon and was cross-examined about his plea bargain. Having concluded that Cox was not afforded any promises or agreement as to the matter of a fine, the government

was not under any duty to modify his testimony. We find no deprivation of Defendant Weidman's due process rights in the conduct of the government as to Walter B. Cox's plea agreement and sentencing.

II—The 1972 Discussions With Walter B. Cox Concerning Immunity

The defendant contends in his brief of 22 April 1976 that the government offered Cox immunity in 1972 in exchange for his testimony and that the government did not disclose the offer. A review of the record of 31 August 1976 does not, however, disclose that there was actually a grant of immunity offered.

Cox's attorney, Mr. Ira Burman, related that he contacted the government and arranged a meeting in 1972 between Cox and representatives of the Department of Justice and the Internal Revenue Service (Tr 8/31/76, p. 183). At the conclusion of those discussions, the federal representatives indicated that they would further explore "the possibility of their seeking the authorization for immunity" (Tr 8/31/76, p. 187). Before anything more definite materialized, however, Cox received phone calls threatening his family (Tr 8/31/76, pp. 186, 188-189, 193-194) and he indicated to Burman that "he did not wish to go through with attempts to obtain immunity" (Tr 8/31/76, p. 192).

Attorney Burman has also indicated that his statement on 22 January 1976 in which he said Cox had had an "understanding that they would arrange for him to have full immunity" (Tr 8/31/76, p. 17—Tr. 1/22/76, p. 9), was "a little strong" (Tr 8/31/76, p. 192). Burman explained that he "was confident that they would have proceeded to obtain the necessary immunity for Mr. Cox if it had not been aborted" (Tr 8/31/76, p. 194).

The record is clear that there was never a formal grant of immunity either tendered or even cleared by the government. Furthermore, the negotiations in this regard were initiated by Cox through his attorney. The defendant nevertheless insists that the negotiations were of such a nature as to be a form of the conduct envisioned in *Campbell, supra.* In light, however, of the fact that no actual offer of immunity was made in 1972 and the further fact that Cox was eventually given immunity (which was disclosed), this court does not agree with the defendant's proposition. The nondisclosure of the 1972 discussions was not conduct amounting to a constitutional deprivation of a fair trial. Accordingly, it does not mandate the granting of a new trial.

III—The Government Reports on an Attempted Bribery of an NLRB Official by Walter B. Cox

The defendant lastly argues that the government failed to disclose documents relating to a purported attempt by Walter B. Cox to bribe an NLRB investigator, a Mr. Stanley J. Fender, and that said nondisclosure resulted in a deprivation of the defendant's right to due process. At the hearing on 31 August 1977, a number of documents relating to the NLRB incident were introduced into evidence. Defendant insists that the documents, viewed either individually or collectively, constituted exculpatory information that the government was under a constitutional obligation to provide them.

This court has reviewed those documents and the pronouncements of the Supreme Court in *Brady* and *Agurs.* Having also taken into consideration the trial record and the post-conviction proceedings, it is concluded that the defendant was not denied a fair trial as to the nonproduction of the documents in question. Regardless of whether a request for evidence is "specific" (as in *Brady*) or "general" (as in *Agurs*), there is no constitutional error entailed in the nondisclosure unless the material is of a "material" nature. See *Brady, supra,* and *Agurs, supra.*

The Supreme Court has never mandated unlimited discovery and a prosecutor is not under a duty to provide everything he knows or might be able to obtain. There was no violation of *Brady* or *Agurs* as regards the documents. Accordingly, the conviction of Weidman cannot be disturbed on these grounds.

Aside from the prosecutor's duty under *Brady* and *Agurs,* the prosecutor also has a duty under the Jencks Act (18 U.S.C. § 3500) to disclose statements of witnesses who testify at trial. The defendant contends that the nondisclosure of Exhibit D constituted a violation of 18 U.S.C. § 3500. As to the Jencks Act arguments, there are two basic issues raised: (1) was Exhibit D a statement under 18 U.S.C. § 3500(e)(2), and (2) was Exhibit D in the possession of the United States?

Exhibit D is a handwritten account of information supplied by Walter B. Cox to Mr. Stanley J. Fender on 14 September 1972. While the document resembles, on its face, an affidavit by Walter B. Cox, it is in fact an unsigned and unsworn draft of a proposed affidavit. Fender expected that Cox would ultimately sign the document under oath and thus transform it into an actual affidavit. The document was, however, never shown to Cox and Cox indicated to Fender that he "would not, under any circumstances, swear to the statement" (Tr 8/31/76, p. 178). Fender did state that the written document was a "substantially verbatim" (Tr 8/31/76, p. 178) account of what Cox told him and it contained "the exact information" (Tr 8/31/76, p. 161) Cox had supplied him.

Of all the possible statements under the Jencks Act, a handwritten account of an interview pursuant to 18 U.S.C. 3500(e)(2) is unquestionably the least reliable and trustworthy. As Justice Stevens has pointed out, a writing is not a "statement" under 18 U.S.C. § 3500 "unless it reflects the witness' own words fully and without distortion. . . ." *United States v. Goldberg,* 96 S.Ct. 1338, 1349

(1976). The possibilities of inaccuracy and distortion are most obviously present where one man drafts a handwritten account of a conversation and the other participant refuses to acknowledge it as accurate. It is one thing to be impeached by one's own words and quite another to be impeached by a handwritten version of a conversation. In addition to the problem of accuracy, there is also some question as to whether the account was "recorded contemporaneously" as required by the statute.

Assuming arguendo, however, that Exhibit D is a "statement", it must nevertheless have been "in possession of the United States". The prosecutors reason that Exhibit D was in the possession of the NLRB and not in the possession of their office and, therefore, it was not in the "possession of the United States". Defendant contends that the phrase "in possession of the United States" extends to any investigating government agency or official within the Executive branch of the government.

The issue of what constitutes "in possession of the United States" is one that has not been extensively treated by the courts. The Court of Claims, in discussing the scope of possession, remarked that:

> . . . a "statement" need not be within the physical control of the prosecution to be "in the possession of the United States." It is sufficient that an investigating Government official has possession. The original *Jencks* decision, supra, 353 U.S. at 659, 673, 77 S.Ct. 1007, as well as the majority of its offspring, have involved the production of reports from the files of the FBI. Cf. Harvey Alum. (Inc.) v. NLRB, 335 F.2d 749, 753-754 (C.A. 9, 1964) (statements held by government agency other than the one conducting a hearing producible under Jencks Act at the hearing). Even in non-Jencks Act evidence-suppression cases, the activities of investigating officials are generally attributed to the prosecution. See Barbee v. Warden,

331 F.2d 842, 846 (C.A. 4, 1964); Curran v. State of Delaware, 154 F.Supp. 27, 31 (D.Del. 1957, aff'd, 259 F.2d 707 (C.A. 3, 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959).

Augenblick v. United States, 377 F.2d 586, 597-598, 180 Ct.Cl. 131 (1967).

It has been held that the Jencks Act does not reach statements made in the legislative proceedings of Congress:

> [1, 2] The Court concludes that the Jencks Act does not apply to the requested material. While the Act probably contemplates disclosure by all Executive investigatory agencies, Augenblick v. United States, 377 F.2d 486, 597-598, 180 Ct.Cl. 131 (1967), rev'd on other grounds, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969), there is no indication that Congress intended it to encompass its own legislative proceedings held in executive session, and its previous and continued resistance to subpoenas *duces tecum* argues strongly to the contrary.
>
> *United States v. Ehrlichman,* 389 F.Supp. 95, 97 (D.C. D.C. 1974).

Central to the resolution of this case is determining if the Jencks Act, as defendant suggests, reaches every agency within the Executive branch of government. To afford the act such a monumentally broad reading would impose a staggering duty upon the United States Attorneys' offices. The prosecutor would be, in effect, obliged to contact every executive agency to see if a witness had made a statement to that office. The inevitable net result would be further inescapable delays in litigation and the continued congestion of criminal dockets. The constitutional boundaries of the Executive branch of government are extensive to say the least.

This court does not believe that Congress intended that the Jencks Act would impose such administrative burdens

on government prosecutors. In a very recent decision, the Third Circuit, in holding that statements in a pre-sentence report were not covered by the Jencks Act, remarked that:

> In speaking of statements "in the possession of the United States", we understand the statute to require production only of statements *possessed by the prosecutorial arm of the federal government.* See Augenblick v. United States, 377 F.2d 586, 597-98, 180 Ct.Cl. 131 (1967), rev'd on other grounds, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); United States v. Ehrlichman, 389 F.Supp. 95 (D.D.C. 1974). Hence, such statements possessed by, for example, the F.B.I. or a United States Attorney must be turned over to the defense on proper motion. (Emphasis supplied.)
>
> *United States v. Dansker,* 537 F.2d 40, 60 (CA 3 1976).

Exhibit D in this case was not possessed by the office of the United States Attorney and was in the custody of the National Labor Relations Board. Inasmuch as it was not "possessed by the prosecutorial arm of the federal government", there was no violation of the Jencks Act in its nonproduction. Accordingly, there was no reversible error committed.

CONCLUSION

The issues initially raised by the defendant as grounds for the granting of a new trial have been exhaustively examined in detail. The nondisclosures discussed above did not, viewed either individually or collectively, operate to deny the defendant a fair trial.

There being no established grounds for the granting of a new trial, Defendant Weidman's 22 April 1976 Motion is properly denied.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1110

UNITED STATES OF AMERICA, *Appellee,*

v.

JOHN H. WEIDMAN, JR., *Appellant.*

Appeal from the United States District Court for the Northern District of Indiana.
No. S-CR-74-115—Robert A. Grant, *Judge.*

ARGUED OCTOBER 31, 1977—DECIDED MARCH 31, 1978

Before SPRECHER, BAUER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*•

BAUER, *Circuit Judge.* On November 21, 1974, John H. Weidman, Jr., and twenty-one other individuals were indicted on thirty-two counts of mail fraud, four counts of perjury and one count of conspiracy. The indictment alleged that Weidman and other supervisory officials of the Walsh Construction Company had defrauded both Walsh and the Bethlehem Steel Corporation at a major steel mill construction project in Burns Harbor, Indiana. More

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• The Hon. William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

specifically, the named individuals were charged with obtaining money, goods and services for their own benefit through fictitious work orders, false invoices, fraudulent purchase orders and inflated labor and equipment charges.

Through a variety of plea agreements, the indictment was dismissed as to twenty of the defendants, leaving only Weidman (the president of Walsh) and Thomas J. McGrath (a Walsh vice president) to stand trial. While McGrath was ultimately acquitted, Weidman was found guilty of fourteen counts of mail fraud and one count of prejury. From this conviction, and the lower court's subsequent denial of his motion for a new trial, Weidman now appeals.

I.

In the first of his two principal arguments on appeal, Weidman claims that the lower court improperly admitted evidence on the earlier schemes of Walsh supervisory officials—schemes which, in their essential details, bore a close resemblance to the alleged mail fraud offense at Burns Harbor.[1] It is Weidman's contention that this testimony had no evidentiary value, was highly prejudicial, and thus was not properly admissible as evidence of "prior similar acts."

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[1] Specifically, the prosecution introduced evidence of allegedly fraudulent activities by Walsh personnel in four earlier construction projects:

1. a project for Bethlehem Steel at Sparrows Point, Maryland;
2. three projects for National Steel subsidiaries:
   a. the Weirton, West Virginia project (completed sometime in the 1950's);
   b. the Midwest Steel project (from 1959 to 1971);
   c. the Great Lakes project (begun in 1964).

The testimony on one of the projects—the Sparrows Point project—was not offered by the government to implicate Weidman. Rather, it was offered only to show the existence of a fraudulent scheme. An instruction tendered by the defendant was given immediately after the Sparrows Point testimony to remind the jury that the evidence was not offered as to the state of mind of Weidman.

In considering the claim, we begin by noting that evidence of prior similar acts cannot be used to show that the accused, by virtue of his character, was predisposed to commit the crime with which he is charged. But prior similar acts may be used to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Fed. R. Evid. 404(b). Thus, this Court has held that evidence of similar acts is properly admissible for any of these purposes "unless its probative value is outweighed by its prejudicial effect." *United States v. Fearns,* 401 F.2d 486, 490 (7th Cir. 1974). "And the balancing of probative value against prejudice is, in the first instance, left to the sound discretion of the trial judge." *United States v. Jones,* 438 F.2d 461, 465 (7th Cir. 1971).

The appellant argues, however, that the element of intent was merely a "formal issue" in the proceedings below. Emphasizing that his defense was based not on a claim of "accident" or "mistake" but on the broad denial that he had committed the charged acts, he insists that there was in fact no contest as to his state of mind. Therefore, he concludes, there was no evidentiary need for the testimony on prior similar acts which could justify its prejudicial effect.

To support his claim, Weidman relies heavily on *United States v. Fierson,* 419 F.2d 1020 (7th Cir. 1969). The crux of the *Fierson* decision lay in its holding that evidence of prior similar acts should not be admitted "to show willfulness and intent when . . . the accused does not, except for demanding an instruction on the requisite willfulness and intent, otherwise put that issue in dispute." *Id.* at 1023. The facts of the case, according to the Court,

> "did not raise even the slightest suggestion that Fierson did the physical act charged but without the requisite willfulness and intent. There was no suggestion of accident or mistake. The defendant simply said he did not commit the physical act charged . . . .

> If the defendant had admitted the above acts but defended on the theory that he was joking and really did not mean it, then the matter of his intent might be said to be in issue. . . . But here the issue of willfulness and intent was not sharpened; it was not really in dispute."

Id. at 1023. Thus, concluding that the probative value of the similar act evidence could not outweigh the risk of prejudice, the Court found the admission of the evidence to be reversible error.

In the case at hand, however, the Government had a substantial need to produce evidence of Weidman's intent even though he had not "sharpened" the issue by claiming accident or mistake. For an essential element of the mail fraud offense—an element that the Government must prove beyond a reasonable doubt—is the defendant's specific intent to defraud. Thus, this Court has held that evidence of prior similar acts is "particularly appropriate where, as with mail fraud, criminal intent is an essential element of the crime charged." *United States v. Hutul,* 416 F.2d 607, 624 (7th Cir. 1969). In *United States v. Marine,* we noted that

> "proof of specific intent to defraud is an essential element of the offense here involved and . . . the Government [has] the burden of proving such specific intent beyond a reasonable doubt regardless of whether or not defendant, in his opening statement, asserted his innocence or culpability as to that issue."

413 F.2d 214, 216 (7th Cir. 1969).

So quite apart from the nature of Weidman's defense there was, on the issue of intent, a substantial need for the government's evidence on prior similar acts. But this was not the only ground on which the testimony was relevant; it also furnished evidence of a pre-existing design

or scheme.[2] And the use of prior similar acts for this purpose is appropriate whenever the accused denies the very doing of the act charged:

> "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design . . . . The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design system, plan or scheme, directed forward to the doing of that act."

2 Wigmore, *Evidence* § 304 at 202. See also *United States v. Fearns, supra* at 419. Thus, by showing that the earlier schemes "bore a singular strong resemblance to the pattern of the offense charged," *United States v. Jones,* 438 F.2d 461, 466 (7th Cir. 1971), the government established a pre-existing plan or design which, in turn, tended to show "the doing of the act designed." Wigmore, *supra* at 202.

In this connection, however, the appellant makes one additional claim, namely, that the similar act evidence was not properly admissible against him since there was no convincing proof that he was actively involved in all of the other fraudulent activities. At the very least, however, the Government's evidence did indicate that Weidman was well aware of the earlier schemes in all of their particulars;[3] and it is this element of knowledge that estab-

[2] The Government's failure to state this additional ground for the admissibility of the evidence is no basis for reversal. *United States v. Juarez,* —— F.2d ——, (7th Cir. 1977).

[3] For example, witness Beutler, an auditor for National Steel, testified that a series of audits which he performed on work done by Walsh at the Weirton, Great Lakes and Midwest Steel projects revealed that National had been subjected to overcharges in "157 different ways." Beutler testified further that, in auditing both the Great Lakes and Midwest Steel projects, he dealt extensively with the defendant; indeed, Weidman, according to Beutler, defended the legitimacy of the charges (as well as other apparent improprieties involving Walsh personnel) by arguing that such practices had been the rule in the past, so that "we are just continuing to do business as usual." These overcharges and improprieties were quite similar to those found at Burns Harbor.

Beutler also testified that, in the early stages of his audit of the Great Lakes project, he was given access to certain work records (the so-called "time cards"), but that Weidman later denied him access to those cards. As it turned out, the time cards were an important source document for the audit since the costs of the benefits that were fraudulently obtained by Walsh officials were often concealed in fictitious work records. Beutler's testimony on this point became especially significant once the Government established that, within six months of the Great Lakes audit, Weidman ordered the time cards destroyed at Burns Harbor.

lishes the relevancy of the similar act evidence.[4] The purpose of such evidence, after all, at least on the issue of a pre-existing plan or scheme, is simply "to fix a design upon the defendant, as making it likely that he carried it out . . . ." Wigmore, *supra* at 204-205. This purpose was realized, it seems clear, when the Government showed that Weidman, by virtue of his knowledge of, or involvement in, the earlier schemes, was well acquainted with the modus operandi employed in the alleged mail fraud offense at Burns Harbor. By the same token, Weidman's knowledge of the earlier schemes served as the basis for their relevancy on the issue of intent.

We conclude, then, that on several grounds—intent, knowledge, design—there was substantial value in the testimony on other fraudulent activities involving Walsh supervisory officials. In this light, we cannot agree that the lower court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial effect.

[4] Significantly, Rule 404(b) does not require the defendant to be an active participant in the other similar acts.

II.

In the second of his two major arguments on appeal, Weidman insists that the district court erred in denying his motion for a new trial. This motion was based on a claim that he had been unfairly prejudiced by the Government's failure to provide information on Walter B. Cox, a major witness at trial and a central figure in the mail fraud scheme. More specifically, according to Weidman, the prosecution improperly withheld information on (1) discussions that were held in 1972 between Cox and the Government on a possible grant of full immunity; (2) the Government's alleged agreement to recommend that Cox not be fined for filing a false income tax return; and (3) Cox's alleged attempt to bribe an NLRB official. Following an evidentiary hearing on August 31, 1976, the district court found that none of the three "nondisclosures" operated to deprive the defendant of a fair trial. The lower court erred, Weidman now argues, on all three points.

The basis for Weidman's claim is found in the prosecution's constitutional obligation to disclose evidence in its possession that would be material to the defense of the accused. This obligation was firmly established by the Supreme Court's decision in *Brady v. Maryland,* 373 U.S. 83 (1963). But it was not until *United States v. Agurs,* 427 U.S. 97 (1976), that the Court identified the criteria to be used in determining whether evidence is sufficiently "material" to make its nondisclosure a constitutional error. The standard of materiality, according to the Court, varies with three distinct factual settings:

1. the undisclosed evidence demonstrates that the prosecution's case included perjured testimony;
2. the defense made no request, or only a general one, for the undisclosed material;
3. the defense made a specific request for the evidence.

In the case of perjured testimony, the Court held that a conviction must be set aside if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. In the case of a general request, however, the Court found that a new trial is justified only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112. Finally, in the case of a specific request, while the Court did not define the precise standard of materiality to be applied, it did clearly indicate that a lesser showing of materiality is required than in the case of a general request. 427 U.S. at 106. With these general principles in hand, we may now turn to a consideration of the appellant's specific claims.

A. The 1972 Immunity Discussions

The 1972 immunity discussions between Walter Cox and the Government were cut short when Cox withdrew from further negotiations after receiving an anonymous threat on the life of his son.[5] These initial discussions, then, did not result in any promise, agreement or understanding of any kind; and it was not until 1974 that the Government formally tendered the grant of immunity under which Cox was eventually to testify at trial.[6]

The appellant nevertheless argues that the Government violated its constitutional duty of disclosure by failing to reveal that Cox had previously negotiated for full im-

---

[5] The tapes of the 1972 discussions between Cox and the Government were surrendered to Cox's attorney when he withdrew from negotiations. It appears, then, that there is no record or transcript of the discussions, at least not in the hands of the Government.

[6] This was the finding of the district court, and it is supported by evidence adduced at the August 31, 1976 hearing. Therefore, we will not disturb it on appeal. *United States v. Johnson,* 327 U.S. 106 (1946).

munity.[7] In particular, citing language from the Supreme Court's opinion in *Agurs*—"the failure to make any response [to a specific and relevant request] is seldom, if ever, excusable"[8]—Weidman claims that this information was specifically requested, that its nondisclosure was thus a constitutional error, and that a new trial is therefore required.

However, even if the 1972 discussions did fall within the scope of Weidman's request,[9] it does not follow as a matter of course that a new trial is warranted. It is true, of course, that the "nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Giglio v. United States,* 405 U.S. 150, 154 (1971). But under *Brady* as well as *Agurs,* the specifically requested but undisclosed information must still meet some standard of materiality, however defined, to justify a new trial. *Brady, supra* at 87; *Agurs, supra* at 106.

Whatever that standard may be, it was not met here, for the 1972 discussions simply cannot be viewed as "material" in any meaningful sense of the word. It appears from the record that the Government's effort to implicate Weidman in the Burns Harbor fraud was based largely on the testimony of witnesses other than Cox.[10] More im-

---

[7] In the agreement that was ultimately reached, Cox undertook to plead guilty to one count of filing a false tax return and to cooperate fully in the Burns Harbor prosecution, while the Government promised to grant him immunity against any other prosecution and to bring his cooperation to the attention of the sentencing judge in the tax case.

[8] 427 U.S. at 106.

[9] The pretrial request was for "all communications relating to *arrangements*" with witnesses.

[10] In this connection, the testimony of Elmer Haney, William Weaver, Maurice Strandberg and Woodrow Buckley was particularly significant. It appears that the Government relied on the testimony of Cox principally to establish the existence of the general scheme and the ways in which it operated.

portantly, however, Cox was ultimately given immunity and the terms of the agreement were fully disclosed to the accused; indeed, Cox was thoroughly impeached on these grounds at trial. It seems clear, then, that the mere fact of an earlier, aborted immunity discussion could not serve any significant purpose that was not already served (and more effectively) by the disclosed information on the actual immunity grant. Therefore, it is our conclusion that there is only a remote possibility that the undisclosed information could have affected the outcome of the proceedings below; and this possibility is not, by any standard, sufficient to establish "materiality" in the constitutional sense.

B. The Alleged "No Fine" Agreement

The grounds for the appellant's second claim are found in the following remark made by the U.S. Attorney during Cox's sentencing proceeding:

> "[T]here is one agreement between Mr. Cox and his attorney and the Government which is not of record and that is that at the time of sentencing the Government would recommend that no fine be imposed on Mr. Cox and we do now make that recommendation."

Citing this statement, Weidman argues that there was a "no fine" agreement between the Government and Cox, and that this, too, should have been disclosed under *Brady.* Moreover, as the appellant points out, Cox testified at trial that the terms of the grant of immunity represented his only agreement with the Government. It would seem, therefore, that if there was in fact a "no fine" arrangement, then the prosecution failed to correct a Government witness who testified falsely at trial. See *Agurs, supra* at 103-04.

At the evidentiary hearing, however, the trial court determined that the Government had not made any promises to Cox other than those contained in the written plea

agreement. This conclusion was based on the testimony of Cox, his trial counsel and, most importantly, the U.S. Attorney, who declared that his earlier remark at the sentencing proceedings had been a "misstatement":

> "I know this: that at no time did we ever promise to anybody, either what they would get, or what we would recommend. We made no promises to anyone, including Walter Cox."

Quite clearly, then, the appellant's argument on appeal entails the conclusion that the testimony of the U.S. Attorney was false. This court, however, is not free to determine such matters de novo; rather, we must accept the lower court's findings of fact and credibility so long as those findings are not "wholly unsupported by the evidence." *United States v. Johnson,* 327 U.S. 106 (1946). And here, the appellant's speculations on human nature simply do not provide any firm ground for us to discredit the explanation supplied by the U.S. Attorney. We must conclude, then, that there is a sufficient basis in the record to support the trial court's conclusion that the Government did not make a "no fine" agreement with Cox. Moreover, the Government's failure to disclose whatever discussions may have been held on this point stands on an equal footing with its failure to disclose the 1972 immunity discussions; neither is sufficiently material to warrant a new trial.

C. The NLRB Incident

In the course of the evidentiary hearing on the motion for a new trial, a number of documents were produced which dealt with Cox's alleged 1972 attempt to bribe Stanley J. Fender, a Field Examiner for the National Labor Relations Board. The documents included an NLRB letter to the U.S. Attorney requesting an investigation of the charge, an FBI report on the investigation that was subsequently conducted, and the U.S. Attorney's declination of prosecution. In addition, Fender produced at the hearing his handwritten account of a "statement" that Cox had provided (but refused to sign or even read) on the fraudulent scheme at Burns Harbor.

It is Weidman's claim once again that the Government's failure to produce the NLRB file containing these documents in the face of a specific request violated its duties of disclosure under *Brady* and *Agurs.* Of particular importance, according to the appellant, is Fender's handwritten account of Cox's "statement," for that account makes no mention of Weidman's name in describing the Burns Harbor fraud. In addition, however, the appellant also insists that details on the alleged bribery attempt could have been useful in impeaching the witness.

In the factual setting of this case, the appellant's argument raises some major questions concerning the scope of the prosecutor's constitutional obligation to produce evidence favorable to the defendant. The Supreme Court's decision in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This holding, in turn, was grounded on certain basic elements of fairness that are implicit in the due process requirements of a fair trial. More particularly, the Court indicated that a fundamental notion of fairness in criminal trials demands "that the state in its zeal to convict a defendant not suppress evidence that might exonerate him." *United States v. Agurs,* 427 U.S. 97, 116 (Marshall, J., dissenting).

It seems clear that the essential unfairness found by the Court in the *Brady* setting is directly bound up with the fact of "suppression"—that is, some act or failure to act on the part of the prosecution which renders material

exculpatory evidence unavailable to the accused.[11] Indeed, in this element of suppression lies the constitutional basis for distinguishing "*Brady*" material from all other kinds of newly discovered evidence. For if the evidence is available to the accused from some source other than the prosecution, and if he is aware of both the evidence and its source, he could in no way be harmed by the prosecution's failure to produce the documents. As a result, there could be no basis for finding unfairness, and, hence, no basis for finding a due process violation.

In this case, the NLRB file on Walter Cox was not rendered unavailable to Weidman by the prosecution's failure to produce it. The file, as it turned out, was not in the hands of the prosecution, nor, apparently, was the prosecution even aware of the alleged bribery attempt before Weidman requested the file three weeks after the trial had begun. The defendant, however, was well aware that Cox had been accused of attempting to bribe the official; indeed, he cross-examined Cox on this very point.[12] And, what is equally important, he could have obtained the evidence that he now claims should have been produced under *Brady* by simply subpoenaing the file from the NLRB (a nonprosecutorial agency of the government) and subpoenaing Fender himself.[13] This, in fact, is precisely what he did at the evidentiary hearing on the motion for a new trial.

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[11] The evidence could be made unavailable to the accused in either of two ways: (1) he is not aware of its existence; or (2) he is aware of its existence but unable to obtain it.

[12] Cox admitted that he had been investigated by the FBI but denied the attempted bribe. Under Rule 608(b) of the Federal Rules of Evidence, the defendant could not have proved the bribe by extrinsic evidence. It would seem, therefore, that the documents on the alleged bribe could not have provided any additional impeachment material.

[13] Fender was mentioned by name when Cox was questioned on the alleged bribery attempt by the defense attorney.

Whatever the explanation for the defendant's failure to pursue this course earlier—and none is offered on appeal—we cannot agree that he was denied a fair trial by the failure of the prosecution to produce the evidence. The file (and, most importantly, the "statement" that Cox gave to the NLRB) was not in the hands of the prosecution; the accused was well aware of its existence; it was available to the accused from a nonprosecutorial source. On these facts, it cannot be said that the prosecution has engaged in a "suppression" of evidence within the meaning of *Brady*.

The appellant also argues that the prosecution's failure to produce the "statement" that Cox gave to the NLRB official violated its obligations under the Jencks Act, 18 U.S.C. § 3500, which provides in relevant part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
>
> • • •
>
> (e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

It is by no means clear that Fender's handwritten account of the interview with Cox (which Cox refused to sign or even read) is a "statement" within the meaning of 18 U.S.C. § 3500(e)(2). Nor is it clear that the Jencks Act requires the prosecution to discover and produce "statements" that are in the possession of other, nonprosecutorial agencies of the government. Indeed, on this point, we find the view of the Third Circuit to be a persuasive one:

> "In speaking of statements 'in the possession of the United States,' we understand the statute to require production only of statements possessed by the prosecutorial arm of the federal government. See *Augenblick v. United States,* 377 F.2d 586, 597-98, 180 Ct. Cl. 131 (1967), *rev'd on other grounds,* 393 U.S. 348, 89 S. Ct. 528, 21 L.Ed.2d 537 (1969); *United States v. Ehrlichman,* 389 F. Supp. 95 (D.C. Cir. 1974).

United States v. Dansker, 537 F.2d 40, 61 (3rd Cir. 1976).

However, even if we were to resolve these questions in the appellant's favor and hold that the Jencks Act required the production of the document, we could not agree that its nonproduction so prejudiced Weidman as to warrant a new trial. "Jencks Act disclosures may be used by the defense only for the purpose of impeachment," *United States v. Harris,* 458 F.2d 670 (5th Cir. 1972), and this document could only have been of marginal value to the appellant's defense as material for impeaching Cox. Since the statement did not pretend to be an exhaustive chronicle of the Burns Harbor mail fraud, there simply is no necessary inconsistency between its omission of Weidman's name and those portions of Cox's subsequent testimony that may have implicated the appellant. Perhaps more importantly, as was noted earlier, it appears from the record that Cox's testimony was not an integral part of the Government's effort to establish Weidman's in-

volvement. Rather, the prosecution relied on other witnesses for this purpose, while using Cox's testimony to establish the existence of the general scheme and the ways in which it operated. Finally, as was also noted earlier, Cox was thoroughly impeached on other grounds; he was presented as a convicted felon, a central figure in the mail fraud scheme, and a witness who had secured immunity from the Government in exchange for his cooperation; moreover, his biased attitude toward Weidman became evident in the course of his testimony. In the light of all this, we cannot agree that the nonproduction of the statement so prejudiced the appellant as to require a new trial.

In sum, then, we have carefully examined each of the appellant's arguments and find no basis for granting a new trial. The judgment of the district court is therefore

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Statement of Witness Cox to NLRB Official Fender

AFFIDAVIT

STATE OF INDIANA
COUNTY OF LAPORTE ss

I, Walter B. Cox, residing on East Oakhill Road Box 269, Chesterton, Indiana [my mail is received through PO Box 371]—phone 926-1708—being duly sworn depose and say:

[1] I was employed by Walsh Construction Company which is owned by Guy F. Atkinson Company from around March 1963 to June 12, 1972 on which date I was discharged. From Nov. 17, 1963 to June 1972 I was the Master Mechanic for the company and I worked exclusively on the Bethlehem Steel project at Burns Harbor, Indiana. Also, I've been a member of Local 150, Operating Engineers Union since May 1, 1956. The union office is located on Kennedy Avenue in Hammond, Indiana and its phone number is 972-1315 and Union Business Agents Dorsey Best and Harry Baker both know the details of my case.

[2] In 1965 I served as the Election Commissioner for the union and in 1968 I was elected delegate to the union convention. I never held any other offices in the union but was at the time of my discharge a member in good standing. My firm opinion is that I was unfairly discharged because of an investigation being conducted by the Internal Revenue Service and another investigation under way by the Justice Department. Walsh Construction has used union employees from my union as well as the Carpenters Union, Laborers, Teamsters, Cement Finishers and others perhaps. In any event, I have no evidence that I was discharged because I was and am a union member.

[3] In October 1966, Tom Walsh, Jr. and I made arrangement to provide me with certain cash moneys to use for purchase of gifts to Bethlehem Steel Project Supervisors

in order to get their cooperation and continued work orders. This practice continued to the Fall of 1967 and during the entire period I received a total of $275,000 from Tom Walsh himself. The money was brought in various amounts by Walsh personally. He is stationed in the New York City office of Walsh Construction which was bought out by Atkinson in 1968, I believe.

[4] Anyway, I purchased a number of new automobiles totalling at least 20 or more. These included Oldsmobiles, Dodges and 1 Cadillac and were purchased in Chesterton and Gary, Indiana. They all were given to either high Bethlehem Steel officials or Walsh officials including our own Asst. Project Manager E. R. Haney and Wm. Weaver our Project Superintendent. Additionally, I purchased such things as furniture, color TV sets, washers, dryers and other appliances including stereos, all of which I distributed or our Project Manager distributed to various Bethlehem Steel officials.

[5] Additionally, at direction of Walsh officials Weaver and Haney, there were many instances when repairs were made on private cars owned by Bethlehem Steel and Walsh officials and were camouflaged as repairs on Walsh equipment. I made out the false repair tickets and the above two officials approved these. Also, Walsh followed the practice of billing Bethlehem Steel Corp. with phony work orders. One example was that for weeks at a time Walsh billed Bethelehem (on a cost-plus basis) as high as 50 for scrapers which were not operating as they were broken down and awaiting repairs. The billings ran $360 dollars day rental plus wages for an operator for each scraper.

[6] Starting in April 1970 I was first contacted by IRS Agent George Keer of the Gary IRS office and in July 1970 the case was referred to IRS Intelligence Division at which time Special Agents Frank Kaffenberger and Mark Blackwell of the Gary office took over the case. However, I obtained legal counsel—Joel Yonover, 3467 Grant Street,

Gary, Indiana—and he still represents me in the matter. His telephone number is A/C 219-887-5291 and he hasn't permitted them to interview me.

[7] Without revealing further details and the mass of evidence within my knowledge and possession, all of which I could furnish with approval of my attorney, I do admit that in my estimation I was discharged by Walsh because of the IRS investigations which are still open.

[8] On July 12, 1972 around 10:30 A.M. J. H. Weidman, Jr., the Walsh Midwest Division V. President called me to the Project Manager's office in one of the Walsh Trailers. Lloyd Dennison, the new Project Supt. and Terry Burdis the New Project Manager were also present. Weidman did the talking. He said "I've been instructed to terminate you." I asked "Why?" and he replied, "I don't know—the West Coast is calling all the shots." The Atkinson home office is located in San Francisco, California. He also told me he had just been out to that office and returned the Sunday before. He then handed me a Discharge Slip signed by him, copy of which is submitted herewith. I then went to the Paymaster after making a photo-copy of my discharge slip, and was given my final pay check which the Paymaster had already made out.

[9] On 7/7/72 I filed a grievance with my union and that same day Union official Dorcey Best and I met with Co. official *Weidman* (who had been by then promoted to President). We talked to Weidman about 30 minutes during which I could not get him to give any reasons for my discharge and Union official Best could not get him to take me back to work. I was earning around $400 weekly gross pay at the time of my discharge.

[10] My job as Master Mechanic was to supervise all the operators and to assign the operators particular machines and the Mechanics to maintenance and repair jobs on the equipment. I did not have independent authority to hire or

fire employees but I took such actions after the assistant Project Manager directed me to do so. During the years 1967, 68 and 69 I had over 300 employees in all under my direction and my responsibility included their time records, their work records and assigning of all machines after the Superintendent made request for specific numbers of machines and operators. If any employee needed time off work I independently permitted him to take time off. In 1972 the operators were making over $8 hourly and the Maintenance Mechanics over $9 hourly.

Supreme Court, U.S.
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JUL 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1552

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN H. WEIDMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

JOHN C. KEENEY,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 16a-31a) is reported at 572 F.2d 1199.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. The petition for a writ of certiorari was filed on April 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied access to potential impeachment evidence by the prosecutor in violation of *Brady* v. *Maryland*, 373 U.S. 83, or the Jencks Act, 18 U.S.C. 3500.

2. Whether evidence of prior similar acts was properly admitted into evidence.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of 14 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment, all except six months of which was suspended in favor of probation, and was fined $10,000.[1] The court of appeals affirmed (Pet. App. 16a-31a).

The evidence, the sufficiency of which petitioner does not challenge, showed that petitioner and other supervisory personnel of the Walsh Construction Company engaged in a scheme to defraud that company and Bethlehem Steel Corporation by obtaining for their own personal use money, goods, and services and charging either Walsh or Bethlehem for the same, purportedly as expenses related to a large construction project Walsh was performing for Bethlehem at Burns Harbor, Indiana (Pet. App. 16a-17a). During the period covered by the indictment, petitioner was the manager of Walsh's district office in Gary, Indiana and, after 1972, president of Walsh (Tr. 3365, 3368, 3376, 3395).

[1] Petitioner and 21 other individuals were initially indicted on 22 mail fraud counts, four perjury counts, and one conspiracy count. As a result of various plea agreements, the indictment was dismissed as to 20 of the individuals, and only petitioner and co-defendant Thomas McGrath went on trial. The perjury counts and six mail fraud counts were dropped prior to trial, and petitioner was acquitted of 12 of the remaining mail fraud counts. Co-defendant McGrath was acquitted of all charges (Pet. App. 16a-17a).

ARGUMENT

1. Petitioner contends (Pet. 9-17) that the government violated the requirements of *Brady* v. *Maryland*, 373 U.S. 83, and the Jencks Act, 18 U.S.C. 3500, by failing to disclose an "NLRB file" (Pet. 9) relating to one of the government's witnesses, Walter Cox. The facts pertaining to that contention are as follows:

Cox, Walsh's master mechanic at the Burns Harbor project, was one of the government's witnesses at the trial. On cross-examination, petitioner's counsel inquired at length about Cox's extensive involvement in the fraudulent scheme and elicited Cox's admissions concerning, *inter alia*, his own plea bargain with the government and his agreement to cooperate with the prosecution, the grant of immunity under which he was testifying, and his personal animosity against petitioner and his co-defendant McGrath resulting from petitioner's having discharged him from

Walsh (Tr. 2444-2448, 2456-2458, 2465-2466, 2517, 2572, 2574). Cox also stated that he had filed a complaint against Walsh with the National Labor Relations Board concerning his discharge, had made statements to the Board in connection with the complaint, but had withdrawn the complaint because he had refused to execute any affidavits with the Board (Tr. 2453-2494). Petitioner's counsel then asked Cox whether the FBI had ever "raised [the] incident" concerning Cox's Labor Board complaint with Cox, and Cox responded that an FBI agent had contacted him and had "made an accusation that I had tried to bribe this Fender [a Board field examiner]—never was nothing about it" (Tr. 2495).

Petitioner's counsel then stated, "Your Honor, I renew my motion in respect to this material * * *—the material that I requested on this issue" (Tr. 2495-2496).[2] The Assistant United States Attorney responded that "I don't know what you're talking about" and stated that he had no materials concerning an FBI investigation of the Labor Board matter (Tr. 2496). After some further testimony by Cox about

[2] The day before, petitioner's counsel had filed a written motion for production of the " 'entire NLRB file on the Walter B. Cox grievance' " and the " 'entire Federal Bureau of Investigation file' dealing with Cox's conduct in the NLRB matter" (Pet. 4-5). The written motion was apparently prompted by tape recordings made by Cox of various telephone conversations, which Cox had furnished to the prosecution and the prosecution had furnished to the defense prior to trial. One of the taped conversations was a call to Cox by an FBI agent asking for an interview with Cox.

his contact with the FBI, the court stated (Tr. 2497), "We hold there'd be compliance in the record at the moment," and the matter was not pursued.

After the trial and verdict, the Assistant United States Attorney discovered that the files of the United States Attorney's office in Fort Wayne[3] contained a letter from the Board to the United States Attorney requesting an investigation of Cox's alleged attempt to bribe Fender, and that the Hammond United States Attorney's office possessed an FBI report of an investigation of the incident, and a report by the United States Attorney's office declining to prosecute on grounds of insufficient evidence (H. Tr. 28-36, 83-87, 148).[4] The Assistant furnished these documents to the court and to petitioner's counsel, and the government joined petitioner in moving the court of appeals to remand for an evidentiary hearing on petitioner's motion for a new trial.[5]

An evidentiary hearing was held. Fender testified and produced at the hearing his own written summary of his interview with Cox (Pet. App. 32a-35a). Fender had prepared the summary in affidavit form for Cox's signature, but Fender testified that Cox

[3] The trial was held in South Bend, Indiana and prosecuted by the United States Attorney's local office in that city.

[4] "H. Tr." refers to the evidentiary hearing on petitioner's motion for new trial held on August 31, 1976.

[5] Petitioner's new trial motion and the evidentiary hearing also concerned two other matters that the government allegedly withheld improperly from petitioner, but petitioner does not challenge here the adverse rulings of the courts below as to those matters.

refused to read or sign the summary (H. Tr. 160-161, 178), thus confirming Cox's own trial testimony on the matter. Fender's summary pertained to Cox's general knowledge of the fraudulent scheme perpetrated by Walsh personnel, but "[w]ithout revealing further details and the mass of evidence within my [Cox's] knowledge and possession" (Pet. App. 34a). The summary made no mention of any bribery attempt by Cox.

The district court denied petitioner's motion for a new trial on the grounds, *inter alia*, that the nondisclosure of the various documents did not violate *Brady* because they were not material (Pet. App. 11a)[6] and that Fender's summary was not a "statement" by Cox within the meaning of the Jencks Act since it was not seen by Cox and since Cox indicated that he would not in any event swear to it (Pet. App. 12a). The court of appeals affirmed those determinations (Pet. App. 26a-31a) on the grounds that petitioner was aware of the bribery accusation against Cox, that petitioner could have subpoenaed Fender himself (and later did so), that petitioner could not in any event have used any documents as extrinsic evidence to impeach Cox's denial of having bribed Fender, and that Fender's summary was not in any event a document in the possession of the prosecution for purposes of *Brady* or the Jencks Act.

[6] The district court also expressed the view that Fender's summary was not in any event "'in the possession of the United States'" within the meaning of the Jencks Act (Pet. App. 13a-14a).

Petitioner claims that the nondisclosure of "the NLRB file regarding Walter Cox's unfair labor practice complaint and alleged bribe attempt" (Pet. 9) violated the *Brady* rule and the Jencks Act, and he contends that the court of appeals erred in concluding that "the file" was not in possession of the government for purposes of *Brady* or the Jencks Act. Although it is not clear from the petition, we shall assume that petitioner's contentions pertain both to the documents in possession of the NLRB (*i.e.*, Fender's summary) and to those in the United States Attorney's office and Hammond in Fort Wayne (*i.e.*, the NLRB letter, the FBI report, and the declination of prosecution). The courts below properly rejected petitioner's contention.

a. With respect to the *Brady* claim, the record amply supports the district court's conclusion that the documents were not "of a 'material' nature" (Pet. App. 11a). Fender's summary of his interview with Cox had no bearing on Cox's alleged bribery or the FBI investigation, which was the reason given for the production request.[7] Although petitioner now claims that that document had other impeachment value, it in fact did no more than confirm Cox's trial testimony concerning his knowledge of and involvement in fraudulent practices by Walsh personnel (see Pet. App. 32a-35a). There is no basis for petitioner's

[7] At trial petitioner's counsel stated (Tr. 2496): "[W]e can impeach the witness because he said he was investigated by the FBI."

claim (Pet. 13-14) that Cox's testimony incriminating petitioner was shown to be false because Fender's summary did not itself incriminate petitioner. The summary explicitly indicated that Cox had not "reveal[ed] further details and the mass of evidence within my knowledge and possession * * *" (Pet. App. 34a). Moreover, Cox indicated at trial that he had made some statements to the NLRB that he had refused to endorse, and petitioner was not foreclosed from examining Cox as to the substance of those statements.

The other documents were also not material to impeaching Cox's credibiilty as materiality has been delineated in *Brady*, *supra*, *Giglio* v. *United States*, 405 U.S. 150, and *United States* v. *Agurs*, 427 U.S. 97. Those documents merely confirmed what Cox testified to at trial—that he had been accused of bribing Fender and that nothing had come of the accusation or the FBI investigation. Moreover, as the court of appeals noted (Pet. App. 28a, n. 12), none of the documents could have been used by the defense to rebut Cox's sworn testimony at trial denying the bribery charge, since Fed. R. Evid. 608(b) adopts the traditional rule that a party may not attack the credibility of a witness by use of extrinsic evidence of the witness's past conduct. Finally, in view of all the other facts elicited by the defense on cross-examination tending to impeach Cox's credibility, the documents in question could have had little if any impact on the issue

of Cox's credibility.[8] See *United States* v. *Rosner*, 516 F.2d 269, 273-278 (C.A. 2), certiorari denied, 427 U.S. 911.

Since the record amply supports the district court's view that the documents were not material within the meaning of the *Brady* rule, it is unnecessary to decide whether the court of appeals correctly held that the documents were not in the possession of the prosecution for purposes of that doctrine. In any event, we submit the court of appeals' conclusion was correct.

The court of appeals apparently focused on Fender's summary and not on the documents in the United States Attorney's offices in Fort Wayne and Hammond, and petitioner's argument also focuses on that document (see Pet. 9-14). We believe the court of appeals correctly concluded that, in the circumstances of this case, the *Brady* rule should not apply to that document. The Labor Board was in no way involved with this prosecution, and its connection to the case was wholly peripheral. Petitioner has never questioned the prosecutor's assertion that he had no knowledge of the

[8] The fact that petitioner made a specific request for the documents does not, contrary to petitioner's assertion (Pet. 9, 13), establish any presumption that *Brady* was violated. The *Brady* rule still requires that the documents be favorable to the defense and material to the issue of guilt or innocence or to the credibility of a witness. Although *Agurs* indicates that the standard of materiality may vary depending on whether a specific request has been made, 427 U.S. at 106, the Court made clear that materiality must still be established before a *Brady* violation can be found. 427 U.S. 104, 112-113. See also *Giglio* v. *United States*, *supra*, 405 U.S. at 154; *Calley* v. *Calloway*, 519 F.2d 184, 222 (C.A. 5), certiorari denied, *sub nom. Calley* v. *Hoffman*, 425 U.S. 911.

matter, and petitioner's mid-trial request for the documents gave the prosecutor little opportunity to initiate an inquiry. Furthermore, as the court of appeals noted, petitioner was aware of the Board matter and the alleged bribe and could have sought or subpoenaed the materials from the Board. In those circumstances, the proposition that either *Brady* or the Jencks Act would pertain to a document in the possession of a Labor Board field examiner would, as the district court said (Pet. App. 14a), "impose a staggering duty upon the United States Attorneys' offices. The prosecutor would be, in effect, obliged to contact every executive agency to see if a witness had made a statement to that office." *United States* v. *Deutsch*, 475 F.2d 55 (C.A. 5), on which petitioner relies for an alleged conflict (Pet. 10-14), is readily distinguishable. In *Deutsch* the defendant was prosecuted for attempting to bribe a Post Office employee, and the materials in question were that employee's personnel records. In holding that the Post Office must be considered part of the government for *Brady* purposes, the court stressed that the Post Office was "closely connected" to the prosecution in that case. 475 F.2d at 57. See also *United States* v. *Haldeman*, 559 F.2d 31, 74, n. 74 (C.A. D.C.), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933 (limiting *Deutsch* to instances where the government agency possessing requested documentary material is "allied with the prosecution"). Here, in contrast, the Labor Board, an inde-

pendent agency, had no connection with the prosecution.[9]

b. Petitioner's Jencks Act claim (Pet. 15-17) relates only to Fender's summary of his interview of Cox.[10]

The district court correctly ruled that Fender's summary was not a "statement * * * of the witness" within the meaning of the Jencks Act. Not only was the summary not reviewed by Cox, but also he expressly refused to adopt or approve it. See 18 U.S.C. 3500(e)(1).[11] See also *Goldberg* v. *United States*,

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[9] If they were material, the documents in the possession of other offices of the United States Attorney would present a more difficult question. Cf. *Giglio* v. *United States*, 405 U.S. 150, where the Court held that material information possessed by one Assistant United States Attorney must be attributed to the Assistant prosecuting the case, notwithstanding the "burden [this rule places] on the large prosecution offices * * *" 405 U.S. at 154. Whether that rule would apply to separate offices is unclear.

[10] The other documents are not even arguably statements of Cox.

[11] The district court also correctly rejected the claim that the document was producible under Section 3500(e)(2) as a "substantially verbatim recital of an oral statement made by [the] witness." Fender testified that he prepared the document on the basis of the information Cox supplied to him, and that he had intended to show the document to Cox to make "any necessary corrections," but that Cox refused to read it (H. Tr. 161, 178). As the district court stated (Pet. App. 12a-13a):

> Of all the possible statements under the Jencks Act, a handwritten account of an interview pursuant to 18 U.S.C. 3500(e)(2) is unquestionably the least reliable and trustworthy. * * * The possibilities of inaccuracy and distortion are most obviously present where one man

425 U.S. 94, 110-111, n. 19 ("This requirement [of 18 U.S.C. 3500(e)(1) that the witness sign or otherwise adopt or approve the statement] clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written.").[12]

2. The court of appeals correctly rejected petitioner's claim (Pet. 18-22) that the district court erred in admitting evidence of other fraudulent acts by other Walsh employees. That issue in any event turns

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drafts a handwritten account of a conversation and the other participant refuses to acknowledge it as accurate.

See also *Goldberg* v. *United States*, 425 U.S. 94, 114, n. 4 (Stevens, J., concurring) and 126 (Powell, J., concurring).

[12] Accordingly, it is also unnecessary to decide whether the court of appeals correctly concluded that the summary was not in the possession of the United States within the meaning of the Jencks Act. In accord with the view of the court of appeals here, several courts have held that statements of witnesses are not producible under the Jencks Act unless they are in possession of the prosecution or some related investigative agency. See *United States* v. *Dansker*, 537 F.2d 40, 61 (C.A. 3), certiorari denied, 429 U.S. 1038 (statement in presentence report prepared by probation department not producible); *Augenblick* v. *United States*, 377 F.2d 586, 597-598 (Ct. Cl.), reversed on other grounds, 393 U.S. 348 (Jencks Act applies only to statements in possession of "investigating officials").

Petitioner relies on *Harvey Aluminum, Inc.* v. *National Labor Relations Board*, 335 F.2d 749 (C.A. 9), and *United States* v. *Bryant*, 439 F.2d 642 (C.A. D.C.), but those cases are distinguishable. *Harvey Aluminum* involved an unfair labor practice proceeding to which the Jencks Act itself does not apply, and the statement there was in the possession of the FBI. In *Bryant*, the statement was in possession of the Bureau of Narcotics and Dangerous Drugs, a law enforcement agency, and had been destroyed by that agency.

on the particular facts of this case and does not warrant this Court's review.

The evidence challenged by petitioner showed that in the course of earlier construction projects other supervisory personnel at Walsh engaged in overcharge schemes similar to the ones charged in the indictment (see, *e.g.*, Tr. 1481, 2160). Although the evidence did not establish petitioner's participation in those schemes, it did show that he was aware of their details. For example, as the court of appeals noted, the evidence showed that an auditor for National Steel brought to petitioner's attention numerous overcharges that were similar to the ones found at Burns Harbor and that were evidenced by employee time cards. The evidence also showed that six months after the National Steel audit, petitioner ordered employee time cards destroyed at Burns Harbor (Pet. App. 20a-21a, n. 3).[13]

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[13] Petitioner also contends that evidence concerning fraudulent overcharges at the Sparrows Point, Maryland, and Weirton, West Virginia projects were also improperly received (Pet. 20). As the court of appeals noted (Pet. App. 17a, n. 2) testimony concerning the Sparrows Point project was not offered to implicate petitioner but only to show the existence of a fraudulent scheme in which both Walsh Contracting and Bethlehem Steel officials participated (Tr. 1481). An instruction tendered by petitioner was given immediately after such testimony to remind the jury that the evidence was not offered on the issue of petitioner's state of mind but exclusively for its value in tending to show the existence of a scheme (Tr. 1769-1770). Additionally, the National Steel auditor who testified concerning the preceding fraudulent overcharges was specifically instructed by the prosecutor to confine his testimony to the Great Lakes and Midwest projects and not to include

The evidence of other fraudulent acts was not admitted to show petitioner's criminal disposition but was properly admitted under Fed. R. Evid. 404(b) to show petitioner's intent, plan, and knowledge. The fact that petitioner did not specifically contest the issue of intent is immaterial; as the court of appeals noted (Pet. App. 19a), specific intent to defraud is an essential element of mail fraud that the government was required to prove beyond a reasonable doubt. See *United States* v. *Marine*, 413 F.2d 214, 216 (C.A. 7). Moreover, since petitioner was not a participant in these other crimes, the danger that the evidence of them would prejudicially tar petitioner as a "bad man" in the eyes of the jury was minimal.[14]

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the Weirton project—of which petitioner had no knowledge. Since the witness complied with this instruction, there was hardly any testimony concerning practices at that project (Tr. 2143, 2148, 2159).

[14] If evidence of other crimes or acts is relevant to such issues as intent, plan or knowledge, it is not material that the defendant was not a participant in those acts. As the court of appeals stated (Pet. App. 21a, n. 4), "Rule 404(b) does not require the defendant to be an active participant in the other similar acts," and there may be many instances when a crime by another person is highly relevant to the guilt or innocence of the defendant—for example, where the defendant is accused of murdering a person in retaliation for that person's earlier crime against him, or where the defendant is charged with committing a crime with an accomplice that is identical in *modus operandi* to a previous crime committed by the accomplice. It is only where the defendant's participation itself is what makes the prior crimes relevant that the courts have required convincing evidence that the defendant was in fact a participant. See, *e.g.*, *United States* v. *Jaqua*, 485 F. 2d 193 (C.A. 5); *United States* v. *Vosper*, 493 F. 2d 433, 437 (C.A. 5), relied on by petitioner (Pet. 19).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1552

JOHN H. WEIDMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I

The Decision Below Is In Conflict With This Court's Decision In *United States* v. *Agurs*, And The Decision Of The Fifth Circuit In *United States* v. *Deutsch*, On The Issue Of Whether A Prosecutor Is Required To Disclose Information, Favorable To The Defendant And Specifically Requested By Him, Which Is In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The first question presented is whether a prosecutor is required to produce information, favorable to the defendant and specifically requested by him, if the information happens to be in the possession of other, non-prosecutorial agencies of the government.

Here, the prosecutor failed to comply with petitioner Weidman's specific request, made pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), for the "entire NLRB file" regarding the unfair labor practice complaint made by Walter Cox. Cox was the prosecution's star

witness who testified at trial against petitioner, the president of Walsh Construction Company. Compliance with petitioner's *Brady* request would have led to the disclosure of a document prepared by NLRB Field Examiner Fender which recited, in handwritten affidavit-form, the account given him by Cox regarding the alleged improprieties at the Burns Harbor construction project on which the indictment of petitioner was based. Cox's statement, made to Fender (Pet. App. C), laid responsibility for the improprieties on other Walsh supervisory personnel, and in no way on petitioner Weidman, and thus contradicted Cox's subsequent trial testimony implicating petitioner.

The Court of Appeals held that the government's failure to produce the Cox statement was not constitutionally wrongful because the NLRB file "was not in the hands of the prosecution" (Pet. App. 28a) but rather in the possession of the NLRB.

1. The government argues (Br. in Opp. 7-9) that the Court need not address the significant constitutional question raised on the ground that, despite petitioner's specific request, Cox's statement was not sufficiently "material" to have required its production under *Brady* v. *Maryland, supra,* and *United States* v. *Agurs,* 427 U.S. 97 (1977). As the government implicitly recognizes, however, this contention finds no support in the Court of Appeals' decision, which rested solely on the broad ground that the *Brady* disclosure obligation did not extend to the documents in the possession of the NLRB. Moreover, although the government states that the district court concluded that the NLRB "documents were not 'of a material nature'" (Br. in Opp. 7), the district court's opinion refers only to the "documents relating to a purported attempt by Walter B. Cox to bribe an NLRB investigator, a Mr. Stanley J. Fender" (Pet. App. 11a)[1] and completely ignores the issue of the materiality of the Cox statement on the Burns Harbor improprieties. Instead, the district court discusses Fender's report of Cox's statement only in the context of the claim that it was required to be produced under the Jencks Act, 18 U.S.C. § 3500. Thus, neither the Court of Appeals nor the district court made any finding that the Cox statement was not sufficiently material to have mandated its disclosure under *Brady and Agurs.*

Moreover, the materiality of the Cox statement is fully evident, especially under the standard established in *United States* v. *Agurs, supra,* for specific requests by a defendant. As the Court there stated, the prosecutor is required to respond "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists . . . *When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable.*" 427 U.S. at 106. (emphasis added.) Here, Fender's report of Cox's statement constituted strong evidence tending to prove that Cox's trial testimony against petitioner was false, since it attributed the responsibility for the Burns Harbor improprieties to other Walsh supervisory personnel, and *not* to petitioner

[1] The documents covered by petitioner's *Brady* request which were produced by the government after trial were: (1) an NLRB letter to the United States Attorney requesting an investigation of the bribery attempt by Cox; (2) an FBI report of its investigation; (3) the United States Attorney's declination of prosecution; and (4) the Fender account of Cox's statement. The discussion of "materiality" in the district court's opinion refers to the first three documents, all of which, unlike the Fender document, expressly concern Cox's bribery attempt.

Weidman. It not only implicitly exculpated petitioner, but also directly contradicted Cox's subsequent testimony at trial, and hence clearly qualifies as evidence to which a criminal defendant is entitled under *Brady* and *Agurs*.

A similar situation was recently presented in *Jones* v. *Jago*, 575 F.2d 1164 (6th Cir., May 3, 1978) involving the state's failure to disclose a prior statement made by one of its trial witnesses, despite the defendant's specific *Brady* request for all such statements. The witness's statement described his own participation in the crime with which the defendant was charged, but made no reference to the defendant or his possible involvement. In the federal habeas proceeding challenging defendant's conviction, the state argued that the witness's statement "was neutral and hence not favorable" or exculpatory to the defendant because it merely failed to mention him. *Id.*, at 1166. Affirming the district court's decision that the state's nondisclosure of the witness's statement violated the defendant's right to due process, the Sixth Circuit stated:

> "The defense specifically requested the information. *The statement of an eyewitness to a crime which makes no reference even to the presence of the defendant or his participation must be viewed as a potentially powerful exculpation.*" *Id.*, at 1168. (emphasis added).

The Court further observed that "under *Agurs* . . . the threshold of materiality is relatively low where a specific request is involved." *Id.*, at 1169.

Cox's statement, which likewise did not implicate or attribute wrongdoing to petitioner, constitutes ana-

logously material and exculpatory evidence to which petitioner was entitled in view of his specific request. Of all the impeachment evidence, it alone would have shown the palpable falsity of Cox's trial testimony.

2. Turning to the central question whether the *Brady* disclosure obligation extends to non-prosecutorial agencies, the government seeks to distinguish *United States* v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973), on the ground that the Post Office was considered part of the government for *Brady* purposes only because it was "closely connected" to the prosecution in that case. (Br. in Opp. 10). The same is true in the present case, however, since Cox's statement to the NLRB was taken by NLRB employee Fender as part of that agency's investigation of Cox's charges with regard to the activities of Walsh Construction Company and its personnel at the Burns Harbor project. Subsequently, petitioner was indicted and prosecuted in connection with those alleged Burns Harbor improprieties, and Cox became the prosecution's star witness against petitioner. Moreover, the NLRB had requested the investigation of Cox's alleged bribe attempt of Fender. After trial, it was disclosed that the documents relating to the United States Attorney's investigation of Cox's bribe attempt, including the NLRB memorandum requesting the investigation, were in the files of the United States Attorney's office.[2] In these circum-

[2] The "close connection" between the NLRB and the government could hardly be clearer, particularly in view of the presence of the "NLRB documents" in the U.S. Attorney's own files. The merest reference to any of the three withheld documents in the U.S. Attorney's files would have led to the fourth, the Cox statement, in the possession of the NLRB. Under *Brady* a prosecutor is held accountable for all office files, without regard to personal knowledge. *Giglio* v. *United States*, 405 U.S. 150 (1971). Here, of course,

stances, it is difficult to maintain that the NLRB's involvement was not at least as significant, if not more significant, than that of the Post Office in *Deutsch.*[3]

Accordingly, there is a clear conflict in the circuits regarding the scope of a prosecutor's duty under *Brady,* and this Court should grant the petition to resolve the conflict.

II

The Decision Below Conflicts With The Decision Of The Ninth Circuit in *Harvey Aluminum* v. *NLRB* And The District Of Columbia Circuit In *United States* v. *Bryant* On The Issue Of Whether The Jencks Act Requires A Prosecutor To Produce Witnesses' Statements In The Possession Of Other, Non-Prosecutorial Agencies Of The Government

The second question presented is whether the Jencks Act, 18 U.S.C. § 3500, requiring production of witnesses' statements "in the possession of the United States," applies to statements in the possession of non-

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the U.S. Attorney's office was at least presumably aware of the documents in its own files, since the U.S. Attorney had declined to prosecute Cox for bribery. Ordinary prudence would have led the prosecution to review the office files before using Cox as a witness against petitioner Weidman. Finding nothing helpful, it evidently decided not to pursue the matter further, without regard to whether disclosure of the documents would have assisted petitioner or led to other exculpatory evidence, such as the Cox statement.

[3] The government's quotation of the district court's statement that acceptance of petitioner's position would mean that the "prosecutor would be, in effect, obliged to contact every executive agency to see if a witness had made a statement to that office" (Br. in Opp. 10) is completely inapposite since it (1) was addressed to the Jencks Act issue, not the *Brady* issue; and (2) is factually inapplicable to this case, where the petitioner made a specific request identifying the particular agency and the file he desired pursuant to *Brady.*

prosecutorial agencies of the government. The Court of Appeals held that it did not so apply.

1. The government offers no satisfactory basis for distinguishing *Harvey Aluminum, Inc.* v. *National Labor Relations Board,* 335 F.2d 749 (9th Cir. 1964) and *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971), which establish that the Act covers more than just the prosecutor's own office or agency. In addition, in *United States* v. *Beasley,* 576 F.2d 626 (July 13, 1978), the Fifth Circuit recently held that the Jencks Act applied to a witness's statement later found in a local office of the Drug Enforcement Administration. As the Court stated:

> "Where armies are deployed in a war on crime, they must maintain sufficient discipline to fulfill their statutory and constitutional duties. The Jencks Act does not on its face restrict its command to the production of statements in the hands of, or known to, the particular prosecuting attorney assigned to the case, the U.S. Attorney's Office, the Criminal Section of the Department of Justice, or even the entire Justice Department. *Its order is unqualified.*" *Id.,* at 631. (emphasis supplied).

In view of the fact that Cox's statement was given to the NLRB in the context of its investigation of an unfair labor practice complaint involving the same alleged improprieties for which petitioner was indicted and prosecuted, and in view of petitioner's specific request for the NLRB file, we submit the Jencks Act applies to Cox's statement and that the decision below conflicts with the Act and the decision of the other circuits.

2. The government further argues that Cox's statement is not covered by the Act because Cox did not review it and "expressly refused to adopt or approve it." (Br. in Opp. 11). This, of course, was not the basis for the Court of Appeals' decision. Moreover, the document involved is Fender's handwritten, affidavit-form recital of the account given him by Cox. The district court expressly noted, and did not question, Fender's testimony that the "written document was a 'substantially verbatim' (Tr. 8/31/76, p. 178) account of what Cox told him and it contained 'the exact information' (Tr. 8/31/76, p. 161) Cox had supplied him." (Pet. App. 12a). Fender also testified that the statement "was written simultaneously with the interview." (Tr. 8/31/76, p. 178).

The government's claim that Cox refused to swear to the statement omits Cox's own qualification—"[i]n the absence of his attorney." (Tr. 8/31/76, p. 178). There is absolutely nothing in the record, either from Fender or Cox, giving the least hint that Cox or the prosecution questioned the accuracy of Fender's reporting of Cox's statement. The defendant's *prima facie* demonstration, through Fender's testimony, that the statement satisfied the requirement of 18 U.S.C. § 3500(e)(2) should be dispositive of the issue, in the absence of a contrary showing by the government. *See Goldberg* v. *United States,* 425 U.S. 94, 108-10 (1976); *Campbell* v. *United States,* 365 U.S. 85, 95-99 (1961); *Palermo* v. *United States,* 360 U.S. 343, 353-55 (1959). We therefore submit that there is no real question but that the Cox statement is within the Jencks Act, and that the petition should be granted by the Court.

III

The Decision Below Raises Substantial And Important Question Concerning The Admissibility Of "Prior Similar Acts" Under Rule 404(b) Of The Federal Rules Of Evidence

The third question presented is whether evidence of allegedly fraudulent activities by Walsh supervisory personnel in four earlier construction projects was properly admitted against petitioner, despite the absence of convincing proof that petitioner participated in, or was responsible for, any of these allegedly fraudulent practices.

The government admits that petitioner was not a participant in these other alleged schemes or crimes (Br. in Opp. 13-14), but defends the admission of the evidence on other grounds.

1. As to the evidence regarding the construction project at Sparrows Point, Maryland, the government claims that it was "not offered to implicate petitioner but only to show the existence of a fraudulent scheme in which both Walsh Contracting and Bethlehem Steel officials participated." (Br. in Opp. 13, n. 13). This argument overlooks the fact that the alleged Sparrows Point fraud, although originally embraced in the indictment's definition of the charged "joint criminal enterprise," had, with the prosecutor's consent, been striken from the indictment prior to trial, so that the Sparrows Point evidence, to be received, would have to pass muster under the "similar offense" rule. Petitioner Weidman, however, had nothing to do with the project and was not shown to have any awareness of the alleged fraud.

2. As to the Midwest Steel project and Great Lakes project, the government argues that the evidence

was properly admissible against petitioner under the "similar offense" rule of Fed. R. Evid. 404(b) to show petitioner's intent, plan, and knowledge. The government concedes the total absence of evidence that petitioner participated in these other alleged schemes, but contends it suffices that a National Steel auditor brought some claimed overcharges at these projects to petitioner's attention after they occurred.

The government does not explain how the simple fact of petitioner's after-acquired knowledge of alleged misconduct by company employees at other projects can be probative of petitioner's intent in the Burns Harbor project or why it should open the door to allow the introduction of evidence that was extremely prejudicial to petitioner. It cites no authority for the proposition that evidence of crimes in which a defendant did *not* participate, but only heard about after those crimes occurred, can be used to prove defendant's guilty intent in some other alleged crime. The rule is to the contrary, as the Fifth Circuit held in both *United States* v. *Jaqua*, 485 F.2d 193, 195 (5th Cir. 1973) (evidence of defendant's prior "criminal activity" improperly admitted where there was no "evidence in the record that [the defendant] committed these acts"), and *United States* v. *Vosper*, 493 F.2d 433, 437 (5th Cir. 1974) (similar offense evidence inadmissible where there was "little, save [defendant's] presence [and the guilt of his associate] to show that he had any responsibility for or participated in" the prior robbery). Absent clear and convincing proof of personal participation, admission of "similar offense" evidence in cases such as the present is nothing more than an endeavor to establish guilt by association.

3. As to evidence of fraudulent practices at the fourth project (Weirton), the government does not suggest any reason for its admissibility. The government concedes that the petitioner had no knowledge of any of the alleged practices at this project. (Br. in Opp. 13, n. 13). Nevertheless, the evidence was admitted and inevitably used to tar petitioner with the conduct of other company personnel.

4. As to petitioner's contention that the above evidence was additionally irrelevant because no defense of intent was asserted, the government responds only that specific intent to defraud is an essential element of the mail fraud offense which it was required to prove and that petitioner's failure to contest the issue of intent is immaterial. This conflicts with the recent decision of the Second Circuit in *United States* v. *O'Connor*, —— F.2d ——, No. 77-1378 (July 10, 1978), involving a charge that the defendant received money from meat packing companies in connection with his official duties in violation of 21 U.S.C. § 622. Holding that evidence of defendant's prior receipt of bribes was inadmissible on the issue of intent because no such defense was asserted, the Court stated:

> "In the case before us, the Government argued to the trial judge that the evidence of other crimes should be admitted to 'prove intent, plan, knowledge, and the absence of any mistake or accident.' Despite defense counsel's protestation that there was no real issue of intent, the judge admitted the disputed testimony as relevant to defendant's intent and plan, and so advised the jury. On this record, the former theory was incorrect. As we pointed out in [*United States* v.] *Bennedetto* [571 F.2d 1246 (2d Cir. 1978)]:

> Defendant did not claim that he took the money from the [three] companies named in the indictment innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute . . .

Id. at 1249; see also *United States* v. *DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970)." (Slip Op. 3869-3870). (footnotes omitted).

The same conclusion obtains here, since petitioner likewise did not raise intent as a defense. The decision below is thus in conflict with that of the Second Circuit in *United States* v. *O'Connor, id.*.

The Fifth Circuit has also rejected the approach of the decision below. In *United States* v. *Silva*, —— F.2d ——, No. 77-5639 (September 13, 1978), the Fifth Circuit reversed defendant's conviction for distribution of narcotics, in violation of 21 U.S.C § 841(a)(1), because the trial court had admitted evidence of subsequent crimes to show defendant's intent, even though the defendant flatly denied any participation in the crime charged and raised no issue of intent. The Court explained that for such evidence to be admissible, "the element of the prior crime for which there is a recognized exception [*e.g.* "intent"] must be a material issue in the case." (Slip. Op. 6949). It continued:

> "Applying this test to the present case, the testimony concerning the appellant's subsequent acts clearly fails to meet the third prerequisite and therefore should not have been admitted. In determining that intent was never a material issue, we are guided by the proposition that the materiality of intent depends, not on the statutory definition of the offense, but on the circumstances of the case and on the nature of the defense. *United States* v. *Adderly*, 529 F.2d 1178, 1181 (5th Cir. 1976). In the present case the defendant's sole defense was that of mistaken identity. This court has acknowledged in *Adderly, supra* at 1181, that a defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred." (Slip. Op. 6949.)

This Court should therefore resolve the conflicts in the circuits.[4]

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the for the Seventh Circuit.

Respectfully submitted,

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[4] Copies of the recent decisions cited in this memorandum have been provided to the Clerk of the Court.